No. 83 56

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,
PETITIONER

v.

COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether the Secretary of Health and Human Services may be estopped from recovering excess payments made to a provider of health care services under the Medicare program on the ground that a fiscal intermediary previously had advised the provider that the payments were allowable.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Ada Werner, Frank E. Werner, and Shirley Sorger were appellants and the Travelers Insurance Companies was an appellee in the court of appeals.

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The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-33a) is reported at 698 F.2d 615. The opinions of the district court (App. C, *infra*, 36a-48a) and the Provider Reimbursement Review Board (App. D, *infra*, 49a-54a) are not reported.

JURISDICTION

The judgment of the court of appeals (App. E, *infra*, 55a-56a) was entered on January 19, 1983. A petition for rehearing was denied on February 14, 1983 (App. B, *infra*, 34a-35a). On May 6, 1983, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including July 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

Section 1815(a) of the Social Security Act, 42 U.S.C. 1395g(a), provides:

> The Secretary shall periodically determine the amount which should be paid under this part to each provider of services with respect to the services furnished by it, and the provider of services shall be paid, at such time or times as the Secretary believes appropriate (but not less often than monthly) and prior to audit or settlement by the General Accounting Office, from the Federal Hospital Insurance Trust Fund, the amounts so determined, with necessary adjustments on account of previously made overpayments or underpayments; except that no such payments shall be made to any provider unless it has furnished such information as the Secretary may request in order to determine the amounts due such provider under this part for the period with respect to which the amounts are being paid or any prior period.

Section 1861(v)(1)(A) of the Social Security Act, 42 U.S.C. 1395x(v)(1)(A), provides in part that the Secretary's regulations governing the determination of the reasonable cost of services shall

> provide for the making of suitable retroactive corrective adjustments where, for a provider of services for any fiscal period, the aggregate reimbursement produced by the methods of determining costs proves to be either inadequate or excessive.

42 C.F.R. 405.423 provides in part:

> (a) *Principle.* Unrestricted grants, gifts, and income from endowments should not be deducted from operating costs in computing reimbursable cost. Grants, gifts, or endowment income designated by a donor for paying specific operating costs should be deducted from the particular operating cost or group of costs.
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> (c) *Application.*
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> * * * * *
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> (2) Donor-restricted funds which are designated for paying certain hospital operating expenses

should apply and serve to reduce these costs or group of costs and benefit all patients who use services covered by the donation. If such costs are not reduced, the provider would secure reimbursement for the same expense twice; it would be reimbursed through the donor-restricted contributions as well as from patients and third-party payers including the title XVIII health insurance program.

* * * * *

42 C.F.R. 405.1885 provides in part:

(a) A determination of an intermediary, a decision by a hearing officer or panel of hearing officers, a decision by the Board, or a decision of the Secretary may be reopened with respect to findings on matters at issue in such determination or decision, by such intermediary officer or panel of hearing officers, Board, or Secretary, as the case may be, either on motion of such intermediary officer or panel of hearing officers, Board, or Secretary, or on the motion of the provider affected by such determination or decision to revise any matter in issue at any such proceedings. Any such request to reopen must be made within 3 years of the date of the notice of the intermediary or Board hearing decision, or where there has been no such decision, any such request to reopen must be made within 3 years of the date of notice of the intermediary determination. No such determination or decision may be reopened after such 3-year period except as provided in paragraphs (d) and (e) of this section.

(b) A determination or a hearing decision rendered by the intermediary shall be reopened and revised by the intermediary, if, within the aforementioned 3-year period, the Health Care Financing Administration notifies the intermediary that such determination or decision is inconsistent with the applicable law, regulations, or general instructions issued by the Health Care Financing Administration in accordance with the Secretary's agreement with the intermediary.

STATEMENT

1. This case raises the question whether the Secretary of Health and Human Services may be estopped from recovering excess payments made to a provider of health care

services under the Medicare program on the ground that a fiscal intermediary had previously advised the provider that the payments were allowable. Title XVIII of the Social Security Act, 42 U.S.C. (& Supp. V) 1395 *et seq.*, establishes Medicare, a two-part program of federal assistance for the medical care of the aged and disabled. Part A of the program provides "hospital insurance" benefits (inpatient hospital care and post-hospital extended or home health care) and is financed by Social Security payroll contributions. 42 U.S.C. (& Supp. V) 1395c-1395i-2. Part B of the program provides "medical insurance" benefits for physician services and outpatient services and supplies and is financed by the premium payments of enrollees together with contributions from funds appropriated by Congress. 42 U.S.C. (& Supp. V) 1395j-1395w. Both parts of the program are administered by the Health Care Financing Administration ("HCFA"), a part of the Department of Health and Human Services ("HHS"). This case involves payments made under Part A of the program.

Health care providers of Part A services are generally hospitals, skilled nursing facilities, and home health agencies. Instead of reimbursing Part A Medicare beneficiaries directly, the Secretary of Health and Human Services pays the provider for the health care services it has rendered to beneficiaries. The Medicare statute provides for reimbursement only for the "reasonable cost of any services," which is defined as "the cost actually incurred, excluding therefrom any part of incurred cost found to be unnecessary in the efficient delivery of needed health services." 42 U.S.C. 1395x(v)(1)(A). See also 42 U.S.C. (Supp. V) 1395f(b). Congress has given the Secretary express statutory authority to establish the methods for determining "reasonable costs" for services. See 42 U.S.C. 1395x(v)(1)(A).[1] The Secretary has exercised this authority by promulgating regulations, 42 C.F.R. 405 *et seq.*, and a series of Health Insurance Manuals.

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[1] In addition, Congress has delegated to the Secretary general authority to prescribe regulations necessary to carry out the administration of the Medicare program under Section 1871 of the Social Security Act, 42 U.S.C. 1395hh.

A provider receives interim payments at least monthly for its estimated reasonable costs incurred in furnishing services to Medicare beneficiaries. 42 U.S.C. (& Supp. V) 1395f, 1395g. A provider's annual cost report is audited later to determine the actual costs incurred. See 42 C.F.R. 405.454, 405.1803. Congress was aware that under this type of reimbursement system it was likely that health care providers would receive overpayments or underpayments at various times. Therefore, it instructed the Secretary to "provide for the making of suitable retroactive corrective adjustments where, for a provider of services for any fiscal period, the aggregate reimbursement produced by the methods of determining costs proves to be either inadequate or excessive." 42 U.S.C. 1395x(v)(1)(A)(ii). The Secretary responded to this congressional directive by promulgating 42 C.F.R. 405.1885, which provides for the reopening, within a three-year period, of any reimbursement determination made by an intermediary, a hearing officer, the Provider Reimbursement Review Board, ("PRRB"), or the Secretary herself. The statute also provides that interim payments to providers shall include "necessary adjustments on account of previously made overpayments or underpayments." 42 U.S.C. 1395g(a). See also 42 C.F.R. 405.454(f), 405.1803(b). In addition, determinations of a fiscal intermediary respecting the total amount of reimbursement payable to a provider for a given cost year are subject to administrative and judicial review. 42 U.S.C. (& Supp. V) 1395*oo*; 42 C.F.R. 405.1801 *et seq.*

At the provider's option, a nongovernmental organization (frequently a private insurance company) may act as "fiscal intermediary." 42 U.S.C. (& Supp. V) 1395h. The intermediary is nominated by the provider, but it enters into agreements with the Secretary and acts on behalf of the Secretary in certain respects. See 42 C.F.R. 421.5(b). The intermediary audits the provider's cost reports and makes payments to the provider for the reasonable cost of services supplied to Medicare beneficiaries. Under the statute the intermediary may also "serve as a center for, and communicate to providers, any information or instructions furnished to it by the Secretary, and serve as a channel of communi-

cation from providers to the Secretary." 42 U.S.C. (Supp. V) 1395h(a)(2)(A).

2. Respondent Community Health Services of Crawford County, Inc. ("CHS"), is a provider of health care services and has participated in the Medicare program since 1966. CHS chose to have its Medicare payments made through a fiscal intermediary, Travelers Insurance Companies ("Travelers"). In 1975 CHS began to receive grant funds under the Comprehensive Employment and Training Act of 1973 ("CETA"), 29 U.S.C. (& Supp. V) 801 *et seq.*, a federal program designed to provide job training and employment opportunities. CHS employed CETA workers, whose salaries and fringe benefits were required to be paid with the federal CETA funds CHS received. CHS included in its Medicare cost reports for 1975, 1976 and 1977 the amount of salaries and fringe benefits paid to CETA workers, but did not offset against these costs the federal CETA funds it had received to cover them. App. A, *infra*, 3a-5a. Accordingly, when it received Medicare reimbursement on the basis of its cost reports, CHS in effect received a second, duplicate payment for the expenses of the CETA workers.

One of the Secretary's regulations relating to determination of reasonable costs, 42 C.F.R. 405.423(a), provides that grants received by a provider for the purpose of paying specific operating costs "should be deducted from the particular operating cost or group of costs" in computing reimbursable costs. That regulation is in furtherance of the principle that a provider may not be reimbursed twice for the same expense.[2] Section 612 of the Medicare Provider Reimbursement Manual carves out a limited exception to this offset rule; when an earmarked grant constitutes "seed money," the funds need not be offset against the costs for which they are designated. Seed money grants are defined as "[g]rants designated for the development of new health care agencies or for expansion of services of established agencies * * *." *Medicare Pro-*

[2] See 42 C.F.R. 405.423(c)(2) ("[i]f such costs are not reduced, the provider would secure reimbursement for the same expense twice; it would be reimbursed through the donor-restricted contributions as well as from patients and third-party payers including [Medicare]").

vider Reimbursement Manual, HIM-15, Pt. I, § 612.2, reproduced in 1 Medicare & Medicaid Guide (CCH) ¶ 5461 (Aug. 1968).

CHS filed its cost reports after consulting with Travelers, its fiscal intermediary. In response to CHS's inquiries, Travelers' Medicare Manager, Michael Reeves, orally advised CHS on several occasions from 1975 to August 1977 that CETA funds constitute "seed money" and therefore need not be deducted from reimbursable costs. Neither Reeves nor CHS consulted HCFA about the matter during this period. App. A, *infra*, 5a. In August 1977 Travelers inquired of HCFA in writing whether CETA funds constitute seed money and thus are exempt from the general principle of offset. HCFA advised Travelers in writing that CETA funds do not constitute seed money and must be offset against the costs of CETA employees. Reeves informed CHS of HCFA's advice by letter (October 7, 1977) and in person (November 9, 1977). *Id.* at 6a. Nevertheless, CHS did not offset the CETA funds in its cost report for the year 1977, which it submitted in February 1978. Travelers adjusted the 1977 cost report to reflect the receipt of CETA funds. App. D, *infra*, 50a.

In June 1978 Travelers sent CHS written notice that its failure to offset CETA funds had resulted in overpayments for 1975, 1976 and 1977 amounting to $71,480 (C.A. App. 25a-28a). The notice informed CHS of the possibility of establishing an extended repayment schedule if CHS could provide adequate documentation supporting its financial condition and a proposed schedule of payments (C.A. App. 25a, 33a). Following receipt of this notice, CHS and three individual recipients of home health care services provided by CHS (respondents Ada Werner, Frank E. Werner, and Shirley Sorger) filed a civil action in the United States District Court for the Western District of Pennsylvania, seeking to enjoin the Secretary from recouping the overpayments. On August 10, 1978, the district court granted a temporary restraining order requiring the Secretary to refrain from recoupment of the overpayments. App.

A, *infra*, 7a. CHS then pursued its administrative remedies before the PRRB.[3]

On March 12, 1980, following an evidentiary hearing, the PRRB ruled that CETA grants do not constitute seed money and must be offset against costs, as required by 42 C.F.R. 405.423 (App. D, *infra*, 49a-54a). While acknowledging CHS's claim that its failure to offset CETA funds was due to the advice it received from the intermediary, the PRRB declined to conclude that the failure to offset was justified. It pointed out that "advice by the Intermediary cannot be a substitute for the opinion of the Secretary" (*id.* at 54a).[4]

CHS sought review of the PRRB decision in district court, contending, *inter alia*, that CETA funds constitute seed money, that the Secretary was estopped from recouping the overpayments, that the Secretary should have waived recovery, and that Travelers was independently liable for the overpayments. The district court consolidated CHS's appeal from the PRRB decision with the suit it had filed in 1978. The court rejected each of CHS's contentions and granted the Secretary's motion for summary judgment (App. C, *infra*, 36a-48a). The court found that the language of 42 C.F.R. 405.423(a) supports the Secretary's ruling that CETA grants are not seed money. It concluded that CETA funds plainly are not "designated for the development of new health care agencies" and that "no tortured construction" could bring CETA grants within the seed money exception (App. C, *infra*, 40a).

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[3] Pursuant to a stipulation between the parties, the Secretary has refrained from recouping the overpayments during the pendency of the administrative proceeding and judicial review and has refunded the amounts previously recouped (C.A. App. 107a-108a).

[4] However, the PRRB reversed the proposed adjustments to the 1975 and 1976 cost reports, because the provider had not been given proper notice of reopening (App. A, *infra*, 8a; App. D, *infra*, 53a-54a). The notice for the year 1976 was reissued in compliance with the applicable regulations, but the notice for the year 1975 could not be reissued, since the three-year reopening period provided by the regulations had passed. Accordingly, the total amount of adjustment was reduced to $63,839, representing the overpayments for 1976 and 1977. App. A, *infra*, 8a. The PRRB decision was the final decision of the Secretary in this case.

The district court also rejected CHS's estoppel argument. The court suggested that estoppel may lie against the government "in certain limited circumstances" (App. C, *infra*, 41a). However, it ruled that the existence of the Secretary's regulation permitting the reopening of reimbursement determinations within a three-year period and the obvious fact that CHS was being reimbursed twice for the same expense defeated its estoppel contention. The court stated (*id.* at 42a):

> The Medicare regulations allow the intermediary to reopen the cost reports up to three years after they have been approved. Thus, CHS relied at its own risk in accepting the intermediary's advice since plaintiff was on notice that all such reports were subject to review. Moreover, the fact that CHS was being reimbursed twice for the same expense should have been a red flag that its windfall was not supportable under the Act.

Finally, the district court rejected CHS's claims that a provision of the Medicare statute entitled it to waiver of the overpayments and that Travelers was independently liable for the failure to render accurate advice concerning the treatment of CETA funds. The court held that mistakes of judgment do not constitute activity outside the intermediary's scope of authority when such mistakes in the treatment of cost items were anticipated by the reopening provision of 42 C.F.R. 405.1885. The court found "no evidence of willful or wanton misconduct" by Reeves (App. C, *infra*, 46a).

3. A divided panel of the court of appeals reversed (App. A, *infra*, 1a-33a). While it recognized the traditional reluctance of courts to apply estoppel against the government, the court of appeals nonetheless held that the Secretary should be estopped from recovering the overpayments from CHS.

The court of appeals viewed this Court's decisions as supporting the principle that "estoppel may be properly applied against the government under certain circumstances" and as giving "tacit recognition" to the use of estoppel against the government upon a finding of "affirmative misconduct" (App. A, *infra*, 10a). The court concluded that the behavior of the intermediary in this case constituted "af-

firmative misconduct" (*id.* at 3a, 15a). It reasoned that the Medicare statute and Travelers' agreement with the Secretary created a "legally binding procedure," under which Travelers was obliged to communicate CHS's inquiry regarding CETA funds to HCFA in a timely manner (*id.* at 15a-16a), and that Travelers had "knowingly violated statutory and procedural guidelines" in failing to follow that procedure (*id.* at 15a). The court concluded that if Travelers had initially consulted HCFA, "CHS would not have been misled" (*id.* at 15a-16a).

The court of appeals distinguished this Court's estoppel decisions on a variety of grounds (App. A, *infra*, 16a-21a). It distinguished *FCIC* v. *Merrill*, 332 U.S. 380 (1947), on the ground that there was "no source to which CHS could have gone to ascertain whether the government agent's advice was wrong" (App. A, *infra*, 17a). Despite the existence of 42 C.F.R. 405.423, the Secretary's regulation requiring the offset of earmarked grants against costs, the court concluded that there was no applicable regulation in force at the time CHS consulted the intermediary (App. A, *infra*, 17a). The court did not find relevant either the requirement of 42 U.S.C. (& Supp. V) 1395g that there be retroactive adjustments to account for overpayments or underpayments to providers, or 42 C.F.R. 405.1885, the Secretary's regulation authorizing reopening of intermediary reimbursement determinations within three years. Instead, it emphasized "the injustice to CHS and the people it serves if it is required to refund the alleged overpayments" (App. A, *infra*, 21a), remarking that the excess Medicare funds had been used "to meet serious human needs" (*ibid.*).

Judge Meanor dissented (App. A, *infra*, 23a-33a). In his view, the government cannot be estopped when the result would be to "render to the opponent a benefit to which he was never substantively entitled" (*id.* at 24a). Judge Meanor found this Court's decision in *FCIC* v. *Merrill*, *supra*, to be controlling (App. A, *infra*, 26a). He concluded that estopping the government in a case like this one "amounts to no more than a court authorized raid on the public treasury" (*id.* at 32a).

REASONS FOR GRANTING THE PETITION

Despite this Court's recent decisions repeating the longstanding principle that estoppel against the government is rarely, if ever, appropriate, the lower courts continue to disregard that principle. Thus, once again, we seek review of a decision that raises important questions concerning whether and in what circumstances the government may be equitably estopped from enforcing statutory restrictions on payments from the federal treasury. The court of appeals has held that, because a fiscal intermediary erroneously advised a health care provider that certain costs were reimbursable under the Medicare Act, the Secretary is barred from recovering overpayments made to the provider. The court below reached this result despite the fact that under the statute and regulations the provider was not entitled to receive the funds and despite the fact that Congress has expressly directed the Secretary to recover such overpayments.

The court of appeals' decision cannot be reconciled with the unbroken line of this Court's cases establishing that the government may not be estopped, at least in the absence of serious affirmative misconduct. See, *e.g.*, *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973); *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961); *FCIC* v. *Merrill*, 332 U.S. 380 (1947). In particular, the decision conflicts with this Court's repeated instruction to the lower courts "'to observe the conditions defined by Congress for charging the public treasury.'" *Schweiker* v. *Hansen*, *supra*, 450 U.S. at 788, quoting *FCIC* v. *Merrill*, *supra*, 332 U.S. at 385. The lower courts continue to disregard that instruction and to express confusion over the proper application of this Court's estoppel rulings.[5] For that rea-

[5] See, *e.g.*, *Home Savings & Loan Ass'n* v. *Nimmo*, 695 F.2d 1251 (10th Cir. 1982); *Portmann* v. *United States*, 674 F.2d 1155 (7th Cir. 1982); *Meister Bros.* v. *Macy*, 674 F.2d 1174 (7th Cir. 1982); *McDonald* v. *Schweiker*, 537 F. Supp. 47 (N.D. Ind. 1981); *Armstrong* v. *United States*, 516 F. Supp. 1252 (D.Colo. 1981). Despite this Court's firm stand against estoppel of the government, the court of appeals here characterized the issue as "far from settled" (App. A, *infra*,

son, and because the decision of the court of appeals threatens the sound administration of the Medicare program, as well as a wide range of other federal programs, by preventing recovery of substantial sums of money owed to the government, review by this Court is warranted.

1. a. Since the earliest days of the Nation, this Court has repeatedly and consistently held that the government may not be equitably estopped from enforcing the laws, even though private parties may, as a result, suffer hardship in particular cases. See, *e.g.*, *Lee* v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366, 369-370 (1813); *Hart* v. *United States*, 95 U.S. 316, 318-319 (1877); *Pine River Logging Co.* v. *United States*, 186 U.S. 279, 291 (1902); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917); *Sutton* v. *United States*, 256 U.S. 575, 579 (1921); *Utah* v. *United States*, 284 U.S. 534, 545-546 (1932); *Wilber National Bank* v. *United States*, 294 U.S. 120, 123-124 (1935); *United States* v. *Stewart*, 311 U.S. 60, 70 (1940); *FCIC* v. *Merrill*, *supra*, 332 U.S. at 384; *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957); *Montana* v. *Kennedy*, *supra*, 366 U.S. at 314-315; *INS* v. *Hibi*, 414 U.S. 5, 8 (1973); *Schweiker* v. *Hansen*, *supra*; *INS* v. *Miranda*, *supra*. Indeed, we know of no decision of this Court holding that estoppel lies against the government in any circumstance.[6]

This rule is founded on the doctrines of sovereign immunity and separation of powers. See, *e.g.*, *United States* v. *Testan*, 424 U.S. 392, 399 (1976); *Dixon* v. *United States*, 381 U.S. 68, 73 (1965); *Snyder* v. *Buck*, 340 U.S. 15, 19 (1950); *United States* v. *San Francisco*, 310 U.S. 16, 29-32 (1940). The actions of government employees cannot alter the terms and conditions established by Congress for the payment of money from the federal treasury. By the same

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9a). See also *Schweiker* v. *Hansen*, *supra*, 450 U.S. at 792 (Marshall, J., dissenting).

[6] In several cases the Court has declined to determine whether the government would be estopped in a case involving serious affirmative misconduct. See, *e.g.*, *INS* v. *Miranda*, *supra*, slip op. 3; *Schweiker* v. *Hansen*, *supra*, 450 U.S. at 788. However, the Court has never identified a case in which the facts established such misconduct.

token, if the judiciary were free to impose otherwise unauthorized liability on the government based simply on its notions of equity, the sovereign would be virtually powerless to control and protect the public fisc.

Despite this Court's repeated directives to the lower courts to observe the conditions Congress has set for charging the public treasury, the court of appeals held that the Secretary may not recover overpayments that respondent CHS was never entitled to receive under the Medicare statute. Congress has provided expressly that reimbursement of Medicare providers must be limited to the "reasonable cost" of the services they provide, as that term is defined by the Secretary through promulgation of regulations. 42 U.S.C. 1395x(v)(1)(A). As part of her regulations defining "reasonable cost," the Secretary has required that grants earmarked for specific operating costs be offset against those costs for purposes of Medicare provider claims, 42 C.F.R. 405.423(a), in order to avoid double reimbursement for the same expenses.[7]

Moreover, Congress has anticipated reimbursement errors and has directed the Secretary to make necessary ad-

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[7] The Secretary has created a limited exception to this offset rule in the case of "seed money" grants, which are grants made for the purpose of establishing or expanding health care agencies. The *Medicare Provider Reimbursement Manual*, HIM-15, Pt. I, § 612.2, reproduced in 1 Medicare & Medicaid Guide (CCH) ¶ 5461 (Aug. 1968), provides:

> Grants designated for the development of new health care agencies or for expansion of services of established agencies are generally referred to as "seed money" grants. "Seed money" grants are not deducted from costs in computing allowable costs. These grants are usually made to cover specific operating costs or group of costs for services for a stated period of time. During this time, the provider will develop sufficient patient caseloads to enable continued self-sustaining operation with funds received from Medicare reimbursement as well as from funds received from other patients or other third-party payers.

As the Manual indicates, "seed money" grants generally are one-time grants. Examples include grants under the Health Underserved Rural Areas program, 42 U.S.C. (& Supp. V) 1310, and grants under the Rural Health Initiative Program, 42 U.S.C. (& Supp. V) 201 *et seq.* Part A Intermediary Letter, No. 79-47, reproduced in [1979-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 30,110 (Dec. 1979).

justments in reimbursement "on account of previously made overpayments or underpayments," 42 U.S.C. 1395g(a), and to "provide for the making of suitable retroactive corrective adjustments" in the case of underpayment or overpayment to a provider. 42 U.S.C. 1395x(v)(1)(A).

Here, CHS submitted cost reports in which it claimed reimbursement for salaries and fringe benefits of CETA employees, but failed to offset the federal CETA funds it had received to cover those very expenses. Because CETA funds are not within the seed money exception to the Secretary's offset rule (see note 7, *supra*), CHS's cost reports were overstated. The reimbursement based on those cost reports thus included funds to which CHS was not entitled under the Medicare statute—funds to cover costs that in fact already had been reimbursed by grants CHS received under a different federal program. The Secretary, pursuant to Congress's mandate and applicable regulations, reopened CHS's cost reports, adjusted them to account for the failure to offset, and attempted to recover the overpayments previously made to CHS. The court of appeals' decision to estop the Secretary from recovering the overpayments frustrates both the substantive limitations Congress placed on entitlement to Medicare reimbursement and the scheme it established for recovery of overpayments from providers.

b. The court of appeals concluded that the Secretary should be estopped from recovering overpayments from CHS because Travelers, the fiscal intermediary, advised CHS on several occasions that it was not necessary to offset CETA funds. But this Court's decisions plainly establish that neither the intermediary's conduct nor CHS's reliance on the intermediary's advice warrants estoppel.

It is quite clear that the conduct at issue here does not justify estopping the government from enforcing the Medicare statute. The court of appeals characterized Travelers as having engaged in "affirmative misconduct" because it advised CHS that the amounts claimed were allowable and because it failed to consult HCFA about the proper treatment of CETA funds. Even if there is an exception to the general rule against estopping the government in cases of serious affirmative misconduct, Travelers' conduct does not

meet that test. The district court found (App. C, *infra*, 46a) that the actions of the intermediary did not amount to "willful or wanton misconduct," but at most constituted a mistake in judgment. Indeed, the conduct in this case is essentially indistinguishable from conduct involved in prior decisions of this Court. For example, in *Schweiker* v. *Hansen*, *supra*, a Social Security claims representative incorrectly advised the claimant that she did not qualify for insurance benefits under 42 U.S.C. (Supp. V) 402(g), and failed to advise her to file a written application for benefits, contrary to instructions in the Social Security Claims Manual. In *FCIC* v. *Merrill*, *supra*, a government agent incorrectly informed a wheat farmer that his crop would be insured, although applicable regulations clearly provided that the crop was not insurable. In both of these cases the Court concluded that the government employee's erroneous advice and failure to take steps to discover the correct information fell "far short of conduct which would raise a serious question whether [the government] is estopped from insisting on compliance with [a] valid regulation." *Schweiker* v. *Hansen*, *supra*, 450 U.S. at 790.[8] Thus, the absence of any affirmative misconduct in this case alone is sufficient to require reversal of the decision below.

Estoppel is also improper for the independent reason that there is a complete absence of any reasonable reliance by CHS on the advice rendered by the intermediary. The Medicare program rests on a system of interim payments and subsequent adjustments for overpayments or underpayments. CHS was on notice that the statute and regulations provide for retroactive adjustments to account

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[8] The court of appeals placed considerable weight on its conclusion that the intermediary failed to carry out what the court referred to as a "legally binding procedure"—consultation with HCFA on matters not settled by statute or regulation (App. A, *infra*, 15a-16a). The Medicare statute, 42 U.S.C. (Supp. V) 1395h(a), states that agreements between the Secretary and intermediaries may provide that the intermediary will serve as a channel of communication between providers and the Secretary. However, there is no indication that Congress intended to impose a duty that would be enforceable by providers in individual instances or that could operate to estop the Secretary from recovering overpayments made to providers.

for overpayments or underpayments; in fact, 42 C.F.R. 405.1885 expressly provides that any intermediary determination may be reopened at any time within three years of the determination if it is found to be inconsistent with the statute, regulations, or HCFA general instructions. The court of appeals virtually ignored these important provisions. But as the district court noted (App. C, *infra*, 42a), the provisions meant that CHS "relied at its own risk in accepting the intermediary's advice." In view of the provisions for reopening of intermediary determinations and retroactive adjustments, it is difficult to understand how any Medicare provider could contend that it reasonably relied on an intermediary's advice as a conclusive construction of the Act.

Moreover, the advice CHS received was oral, not written, and was given informally by an individual who clearly was not in a position to make definitive interpretations of the statute and the Secretary's regulations. See *Schweiker* v. *Hansen*, *supra*, 450 U.S. at 788-789 & n.4. On their face, the regulations require offset of earmarked grants, with no mention of an exception for CETA grants.[9] CHS presumably was aware of these regulations; thus, its reliance on the contrary advice of the intermediary cannot be viewed as reasonable. In addition, as the district court found (App. C, *infra*, 42a), the fact that CHS was receiving double reimbursement for the expenses of hiring CETA employees should have been a "red flag" to CHS.[10]

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[9] CHS argued below that CETA funds should be considered to be seed money, because the contract under which it received the CETA funds stated that they would be used to supplement, rather than supplant, the level of funds otherwise available. See App. D, *infra*, 51a. However, the statutory condition referred to, Section 703(11) of CETA, makes clear that the reference is to supplementation of *non-federal* sources of funds. See 29 U.S.C. 983(11) (formerly Title VI, Section 603(11), of Pub. L. No. 93-203, 87 Stat. 878). Moreover, the definition of seed money found in the *Medicare Provider Reimbursement Manual* (see note 7, *supra*) refers only to grants designated for the development or expansion of health care agencies. CETA funds are not directed to health care agencies, but are intended to increase employment opportunities generally. See 29 U.S.C. (Supp. V) 801.

[10] The mere fact that CHS claims to have consulted Travelers on a number of occasions about the treatment of CETA funds suggests that it had continuing doubts about the advice it was receiving.

Absent reasonable reliance, equitable estoppel is inappropriate in any case; a fortiori, the government may not be estopped in a case like this one, in which the provider's reliance on the intermediary's advice plainly was unreasonable. The court of appeals disregarded this point, focusing instead on what it characterized as the "manifest injustice" to CHS and its clients (App. A, *infra*, 21a). Even if this characterization were correct, it would make no difference to the outcome of this case. This Court has held repeatedly that even substantial detrimental reliance on a government official's misinformation does not give rise to an estoppel. See, *e.g.*, *Montana* v. *Kennedy*, *supra*, 366 U.S. at 314-315 (detrimental reliance on misinformation resulting in loss of citizenship); *Dixon* v. *United States*, *supra*, 381 U.S. at 73 (detrimental reliance on erroneous tax ruling); *FCIC* v. *Merrill*, *supra* (government not estopped from denying insurance benefits although entire wheat crop was destroyed); *United States* v. *San Francisco*, *supra*, 310 U.S. at 32 (detrimental reliance on erroneous administrative rulings resulting in loss of land).

In any event, the statutorily mandated recovery of overpayments from CHS does not amount to "manifest injustice." CHS never had any substantive entitlement to the funds at issue. In fact, it was reimbursed twice for the same expense, from two different sources of federal funds. Thus, it received a windfall, which it now seeks to retain. It is hardly unjust to require CHS to return the payments to which it was never entitled in the first place.

CHS became a Medicare provider voluntarily and presumably was aware of the risks and responsibilities it was assuming, as well as the benefits involved. As noted above, the statute and regulations make clear that retroactive adjustments will be made when overpayments occur. CHS, which had been a Medicare provider for almost a decade when it began claiming the excess funds at issue here, was familiar with the system of interim payments and subsequent adjustments.[11]

[11] The court of appeals was plainly wrong in suggesting (App. A, *infra*, 5a, 13a, 18a-19a) that CHS had no choice but to seek and follow

The court of appeals found it significant that CHS had incurred obligations based on the advice it received and that repayment might require a cut in services to CHS's clients (App. A, *infra*, 2a, 19a). CHS asserted below that it had used the extra funds to render services to the public. But it would be entirely inappropriate to preclude the Secretary from carrying out Congress's directive to recover overpayments simply because the recipients of funds had spent them. See *Bell* v. *New Jersey*, No. 81-2125 (May 31, 1983), slip op. 14 n.15 ("we would find it difficult to believe that Congress meant to permit States to obtain good title to funds otherwise owing to the Federal Government by the simple expedient of spending them"). Of course, no one required or "induced" CHS to expend the excess funds it received; ultimately, it was CHS's choice to take the risk of doing so, in the knowledge that the statute requires that retroactive adjustments be made in the case of overpayments.[12]

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the advice of the intermediary, or that CHS was "induced" to claim the excess funds. CHS was not obliged to accept unquestioningly the intermediary's advice or to act on it, especially when the advice on its face appeared to conflict with written regulations and guidelines. In such a situation, in which it is clear that erroneous advice will lead to overpayments and that the statute and regulations provide for recovery of such overpayments, the provider must exercise independent judgment. Moreover, the court of appeals erred in its assumption (*id.* at 5a, 18a-19a) that CHS could not have communicated with HCFA on this matter; we are aware of no written or unwritten policy that prohibits a provider from submitting nonroutine inquiries to HCFA, and such inquiries are not uncommon.

[12] CHS claimed below that it was unable to repay the funds it had improperly received and that it would have to reduce services to its clients if it were required to repay. These arguments, however, relate to the propriety of the Secretary's recoupment methods rather than the validity of the recoupment order. See *Bell* v. *New Jersey*, *supra*, slip op. 5 n.4. Moreover, the court of appeals ignored the fact that there are ways to avoid the dire consequences predicted by CHS. When Travelers notified CHS that it was required to repay the excess funds, it advised CHS of the option of an extended repayment schedule (C.A. App. 25a-26a). CHS apparently did not pursue this possibility, which could have largely alleviated its financial concerns. See also the Federal Claims Collection Act of 1966, 31 U.S.C. 951 *et seq.* (authorizing

In sum, nothing about this case supports the court of appeals' departure from the principles firmly established in the prior decisions of this Court. The decision below contravenes the mandate of Congress that Medicare reimbursement be confined to the reasonable cost of providing services, as determined by the Secretary, and that the Secretary take action to recover overpayments made to providers. The court of appeals simply disregarded this Court's clear directive in *Schweiker* v. *Hansen*, *supra*, 450 U.S. at 790, that "a court is [not] authorized to overlook * * * any * * * valid requirement for the receipt of [government] benefits."

2. The estoppel issue presented by this case is important. Reopening of provider cost reports and retroactive adjustments for overpayments occur with some frequency in the Medicare program. HHS recovers millions of dollars in overpayments from providers each year as a result of reopenings. Virtually all of this recovery involves initial intermediary determinations later found to be erroneous, like the determination in this case. Thus, there are substantial sums at stake in the Medicare program alone.

In addition, there are many other federal programs that involve federal funding in the form of grants, benefits, loans, or guarantees; under these programs it is often the case that funds are paid out prior to any detailed agency audit of claims or expenditures. A system of interim or advance payments and subsequent recovery of erroneous overpayments is essential to the efficient operation of such programs, including many of the massive social welfare programs created by the Social Security Act. It would lead to intolerable burdens and would require the expenditure of substantial sums of public monies contrary to the dictates of Congress if recipients could retain federal funds to which they were not statutorily entitled whenever they could show that they had claimed the funds following receipt of incorrect advice from a government agent. As Judge Meanor observed (App. A, *infra*, 32a), applying estoppel in

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compromise of a claim or termination of collection action under certain conditions, including inability to pay).

such circumstances "amounts to no more than a court authorized raid on the public treasury."

As we noted above (see pages 11-12, note 5, *supra*), the decision below is not the only recent case in which the lower courts appear to have disregarded the principles set out in this Court's decisions. The willingness of the lower courts to permit estoppel against the government and to order or approve the payment of funds contrary to Congress's directives is a matter of serious concern. The court of appeals' erroneous application of estoppel against the government thus warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1983

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 82-5098

COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., A NONPROFIT CORPORATION, ADA WERNER, AN INDIVIDUAL, FRANK E. WERNER, AN INDIVIDUAL, AND SHIRLEY SORGER, AN INDIVIDUAL, PLAINTIFFS-APPELLANTS

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, AND THE TRAVELERS INSURANCE COMPANIES, A CORPORATION, (D.C. CIVIL NO. 78-74 ERIE) DEFENDANTS-APPELLEES

COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., A NON-PROFIT CORPORATION, PLAINTIFF-APPELLANT

v.

PATRICIA ROBERTS HARRIS, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, AND THE TRAVELERS INSURANCE COMPANIES, A CORPORATION, (D.C. CIVIL NO. 80-056 B ERIE) DEFENDANTS-APPELLEES

ARGUED SEPT. 29, 1982

DECIDED JAN. 19, 1983

REHEARING DENIED FEB. 14, 1983

Before ALDISERT and HIGGINBOTHAM, Circuit Judges, and MEANOR, District Judge*

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*Honorable H. Curtis Meanor, United States District Court for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., Circuit Judge.

Since time immemorial it has been argued that "The King can do no wrong;" therefore, his subjects can neither complain of, nor be indemnified for, the "wrongs" of the King nor for the wrongs of the King's agents. In a different context, we are now asked to affirm a somewhat similarly archaic concept in favor of the United States government, regardless of its effect on innocent persons. Even though the agent of the Secretary of Health and Human Services[1] on *five* different occasions over a two and one-half year period wrongly advised a charitable health care provider that certain costs were reimbursable, and even though the health care provider in good faith made expenditures and *incurred obligations* in excess of $70,000 in reliance on the explicit advice of the agent of the Secretary, and even though the repayment of those "costs" may cause a significant diminution of home health care availability to ill and poor people in a rural medically underserved area, the Secretary now seeks to hold the health care provider liable for recoupment of the reimbursed costs. In effect, the government seems to argue that: "We, just like the King and his agents, can do no wrong, regardless of the grievous consequences we cause innocent people."[2] The issue we must decide is whether, on the facts of this case, the Secretary can be estopped from recouping monies from the very party that was induced, by the government agent's totally erroneous advice, into incurring the expenses for which the reimbursements were made.

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[1] This department was called the Department of Health, Education, and Welfare when this cause of action arose. We will refer to this Department by its present name, the Department of Health and Human Services.

[2] In the government's brief, counsel phrased the issue as follows:

> It is a well established principle of law that estoppel can not be asserted against the government on the basis of alleged misinformation furnished by an employee or agent of the government, even if there is detrimental reliance on that information.

Appellee's Brief at 26.

Appellants, Community Health Services of Crawford County, Inc. (CHS), a nonprofit corporation and Ada Werner, Frank E. Werner, and Shirley Sorger, individuals within the county who utilize CHS' services, ask this court to set aside the summary judgment order of the United States District Court for the Western District of Pennsylvania. Plaintiffs/Appellants have filed two separate suits against the Secretary and its agent, the Travelers Insurance Companies (Travelers). Appellants claim that the decisions of the Provider Reimbursement Review Board (PRRB) and the Secretary, which allowed recoupment of overpayments to CHS under Medicare cost reimbursement procedures, were erroneous. Though appellants assert several grounds for reversal, we agree only that the District Court erred in finding that the United States cannot be estopped from recouping the alleged overpayment. Under the egregious facts of this case and in view of the affirmative misconduct of the government's agent—Travelers—we will reverse the judgment of the district court.

I.

CHS is a charitable health care provider incorporated under the laws of Pennsylvania. In 1966 it entered into an agreement with the Secretary whereby CHS agreed to provide home health care services to eligible individuals under the Medicare provisions of the Social Security Act.[3] The Secretary agreed to reimburse CHS for reasonable costs of such services. In April, 1975, CHS entered into contracts with the Mercer County Consortium Services, Inc. by which CHS was to employ participants in a program established under the Comprehensive Employment and Training Act of 1973[4] (CETA) which is designed to provide job training and experience for unemployed individuals to enhance their future employability. Under the terms of the CETA grants, "CHS was to employ program participants furnished by the regional CETA administration, and it was to

[3] 42 U.S.C. § 1395 *et seq.*

[4] 29 U.S.C. § 801 *et seq.*

be reimbursed for the salaries and fringe benefits paid to those employees."[5]

John C. Wallach, CHS' administrator, testified that CETA workers enabled the agency to expand the range of services it provided and to meet the mushrooming demand for health services in the economically depressed and impoverished rural area in which it functioned.[6] CHS [*sic*] had designated the county that CHS serves as a medically underserved area.[7] It is understandable that from 1975 to 1978 CHS' units of service burgeoned from just under 4,000 to 81,000 per year. In 1979 they increased to over 100,000 units of service.[8] CETA funds became a critical source for financing this expansion because CHS was otherwise dependent upon Medicare reimbursements and charitable contributions.[9] In 1975-1976, CETA grants of $53,402 represented 25% of CHS' budget: in 1976-1977 CETA grants of $81,141 represented 24% of its budget; in 1977-1978, CETA grants of $104,524 represented 18%.[10]

Medicare regulations provide that revenue received by providers in the form of donor-restricted grants, or gifts that must be used to pay designated operating expenses, must be set off against the expenses submitted to Medicare for reimbursement in the provider's cost report.[11] However, the *Provider Reimbursement Manual* at § 612 provides an exception to required offsets known as "Seed Money Grants."[12] "Seed Money" is defined in § 612.2 as "[g]rants designated for the development of new health care agencies or for expansion of services of established

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[5] *Community Health Services, Inc.* v. *Harris*, No. 80-56, Memorandum Opinion, Joint Appendix at 186a.

[6] Transcript of Proceedings before the PRRB (Transcript) at 094-095, 0100-0103, 0106-0108, 0123-0128.

[7] *Id.* at 095.

[8] *Id.* at 0128.

[9] *Id.* at 099.

[10] *Id.* at 0132, 0136.

[11] 42 C.F.R. § 405.423(a).

[12] Quoted in *Community Health Services* v. *Harris*, Joint Appendix at 188a-189a.

agencies. . . ."[13] Thus, the critical question arose as to whether the CETA grants had to be offset against expenses CHS submitted to Medicare for reimbursement.

The administrative structure established under Medicare made it quite difficult for CHS to get an answer to the above question. The administrative process precluded CHS from presenting an inquiry directly to the Secretary. Rather, it was required to consult a fiscal intermediary appointed by the Secretary to serve as his agent. The intermediary's primary duty involved processing claims and payments to providers such as CHS. The intermediary was required statutorily to relay information and instructions from the Secretary to providers and to serve as a channel of communication from providers to the Secretary.[14] Consequently, Wallach presented the question of the appropriate treatment of CETA funds to the intermediary, appellee Travelers Insurance Companies. From 1975 to August 1977, Wallach discussed this issue with Michael Reeves, Travelers' Medicare Manager, on five separate occasions.[15] On each occasion, Reeves advised Wallach that Medicare would not offset the CETA grants against reimbursable costs because they qualified as a "seed money" exception to reimbursement offset as provided in § 612.2 of the *Provider Reimbursement Manual*.[16] CHS prepared its cost reports without offsetting its CETA grants from its reimbursable costs, and Travelers approved CHS' reports for the years 1975, 1976 and 1977. CHS used this additional money to finance the expansion of the health care services it provided to Medicare beneficiaries.[17]

During the years that CHS inquired into the treatment of CETA grants, the Secretary had neither formulated nor promulgated an official policy on the treatment of CETA funds. Administrative procedures applicable to this situation obliged Reeves to refer CHS' inquiries to the Health

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[13] *Id.* at 188a.

[14] 42 U.S.C. § 1395h.

[15] Transcript at 0146.

[16] *Id.* at 0104-0105, 0146-0147.

[17] *Id.* at 0107-0108, 0110-0114.

Care Financing Administrator. Consequently, Reeves was making a policy judgment in his own discretion in advising CHS that CETA funds were seed money and did not have to be offset. It was not until August 4, 1977 that he finally requested instructions about the treatment of CETA grants from the Philadelphia office of the Department's Bureau of Health Insurance as Reeves testified he was required to do under administrative procedures.[18]

The instructions Reeves received from Robert C. Griffith, the Program Officer of the Health Care Financing Administration, contradicted the advice Reeves had given to CHS. Griffith declared that CETA funds did not qualify as seed money and were therefore to be offset against the provider's reimbursable costs.[19] CHS was advised of this instruction by letter dated October 7, 1977 and personally by Reeves on November 9, 1977.[20]

Statutory procedures[21] authorize the Secretary to periodically review providers' cost reports. Thus, a determination made by an intermediary may be reopened and revised if, within three years after notice of the intermediary's determination, the Secretary notifies the intermediary that its determination is inconsistent with applicable law, regulations or general instructions of the Secretary.

Claiming authority under 42 C.F.R. § 405.1885, the Secretary reopened CHS' cost reports for 1975, 1976 and 1977 to recoup the CETA funds he claimed should have been offset against the costs Medicare reimbursed for those years. Beginning in May 1978, Travelers issued Notices of Program Reimbursements to recapture from CHS the following amounts: for the cost year ending October 31, 1975, $7,694.00; for the cost year ending October 31, 1976, $32,460.00; for the cost year ending October 31, 1977, $31,326.00. The total for the three years, $71,480, was to be offset against Medicare reimbursements owned to CHS

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[18] *Id.* at 0179.

[19] *Id.* at 0276.

[20] *Community Health Services, Inc.* v. *Harris*, Joint Appendix at 187a.

[21] 42 U.S.C. § 1395g(a), 42 C.F.R. § 405.1885.

for services it had provided to Medicare beneficiaries.[22] The Secretary demanded that CHS return these alleged overpayments pursuant to 42 C.F.R. § 405.1885. CHS filed a civil action[23] against the Secretary and Travelers requesting the district court to enter a Temporary Restraining Order and an injunction claiming that the Secretary's and Travelers' actions were unlawful and would bankrupt it and force it to cease providing health services to its beneficiaries. Three beneficiaries joined CHS as plaintiffs.[24] The district court granted plaintiffs' petition for a Temporary Restraining Order against the Secretary and Travelers.[25] CHS then pursued administrative remedies through an appeal from the Secretary's decision filed with the PRRB. On November 13, 1979, by stipulation of counsel, the Secretary agreed to cease recouping any of the al-

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[22] Transcript at 0619-0621.

[23] *Community Health Services* v. *Califano*, No. 78-74-B, Joint Appendix at 8a-19a.

[24] These beneficiaries made the following claims: Ada and Frank Werner asserted that, as beneficiaries under the Medicare Act, they had accrued a vested right to services by virtue of their payments into the Social Security system and supplementary medical insurance programs for the aged and disabled. As beneficiaries, they had been, and were likely to become again, recipients of services provided by CHS under the Medicare Act.

Shirley Sorger claimed to be a current beneficiary with an accrued right to CHS' services under the Medicare Act by virtue of a disability due to multiple sclerosis.

In support of their petition, the beneficiaries asserted:

> 23. If CHS is forced to curtail services because of defendants' arbitrary, unlawful and capricious acts and determinations, the individual plaintiffs herein will be deprived of their property interest and right to services under the Medicare Act. This deprivation is likely to cause the individual plaintiffs to be forced out of their homes in order to obtain adequate medical care now provided by CHS. Further, since Crawford County is substantially classified as a "Medically Underserved Area" by the Secretary (see Exhibits "D", "E" and "F"), the individual plaintiffs are likely to be caused severe medical injury, including possibly death, because of the lack of medical facilities and services. Joint Appendix at 12a, 18a.

[25] *Id* at 69a-71a.

leged overpayments, and CHS agreed to a stay in its civil action.[26].

A hearing was held before the PRRB on January 22, 1980, and the Board rendered its decision on March 12, 1980.[27] The PRRB concluded that the CETA grants did not come within the "seed money" exception to reimbursement offsets and that CHS would have to return these monies for the cost years 1976 and 1977. CHS was not required to return those for the cost year 1975 since the notice of reopening was improper and could not be reissued because the three year statutory limitation on reopening the 1975 cost report had expired. The PRRB's decision thus reduced the alleged overpayment to $63,839.

CHS then brought Civil Action No. 80-56B in the United States District Court on April 10, 1980 to review the PRRB's determination of the $63,839 for the cost years 1976 and 1977.[28] On the Secretary's unopposed motion, the Court consolidated civil action No. 78-74B with this action.[29] The parties filed motions for summary judgment. On December 29, 1980, the court granted the Secretary's and Travelers' motion for summary judgment and denied that of CHS and the individual beneficiaries.[30]

On January 14, 1982, appellants filed their notice of appeal. They claim, *inter alia*, that the Secretary should be estopped from recovering the overpayments because his affirmative misconduct induced CHS to include in its cost reports expenses that were covered by CETA grants. We agree with the appellants.

II.

Justice Marshall recently wrote in a dissent that the Supreme Court assumes "that we will know an estoppel when we see one—[but the majority] provides inadequate guid-

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[26] *Id.* at 107a-108a.

[27] Case No. 78-215, Decision 80-D12. The PRRB's decision is in Transcript at 0012-0017.

[28] CHS' complaint is in Joint Appendix at 94a-103a. The answer is in Joint Appendix at 104a-105a.

[29] *Id.* at 109a.

[30] *Id.* at 185a-196a.

ance to the lower courts in an area of the law that . . . is far from settled."[31] As we seek to ascertain and reconcile the conflicting rationales proffered for application or rejection of the estoppel doctrine in a broad variety of cases involving the government, like Justice Marshall, we find this issue far from settled. Thus, we will first explain the doctrine's historical underpinnings, then trace the recent doctrinal developments and conclude by applying what we believe are the most controlling and compelling precedents to the facts of this case.

The doctrine of estoppel is used to prevent a litigant from asserting a claim or a defense against another party who has detrimentally changed his position in reliance upon the litigant's misrepresentation or failure to disclose some material fact.[32] The elements of estoppel ordinarily include a misrepresentation or omission of a material fact by one party; reasonable reliance on that misrepresentation by the other party; and detriment to the other party.[33]

Courts traditionally have been reluctant to apply estoppel against the government. Considerations of sovereign immunity, separation of powers and public policy, such as the fear of binding the government by the improper acts of its agents because of possible resultant fraud and collusion or the severe depletion of the public treasury, explain this judicial reluctance.[34] However, with the great expansion of governmental operations, courts have recently shown a greater willingness to apply estoppel against the government in specific circumstances.[35]

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[31] *Schweiker* v. *Hansen*, 450 U.S. 785, 792, 101 S.Ct. 1468, 1473, 67 L.Ed.2d 685 (1981) (Marshall, J., dissenting).

[32] *Portmann* v. *United States*, 674 F.2d 1155, 1158 (7th Cir. 1982).

[33] *Brown* v. *Richardson*, 395 F. Supp. 185, 191 (W.D.Pa.1975).

[34] See the general discussion of the doctrine of governmental estoppel in *Portmann* v. *United States*, 674 F.2d at 1158-60; K. Davis, Administrative Law Treatise §§ 17.01, 17.03-17.04 (2d Ed. 1 Supp. 1982); Note, Equitable Estoppel of the Government, 79 Colum. L. Rev. 551 (1979).

[35] *See, United States* v. *Fox Lake State Bank*, 366 F.2d 962 (7th Cir. 1966); *Semaan* v. *Mumford*, 335 F.2d 704 (D.C.Cir.1964); *Wal-*

Although the Supreme Court continues to manifest reluctance to apply estoppel against the federal government, it has acknowledged that estoppel may be properly applied against the government under certain circumstances.[36] However, it "has never decided what type of conduct by a Government employee will estop the Government from insisting on compliance with valid regulations governing the distribution of welfare benefits."[37]

Several circuits, including this circuit, have held that "affirmative misconduct" on the part of a government official will entitle petitioner to invoke estoppel against the government.[38] While the Supreme Court has not explicitly adopted the theory of estoppel because of the affirmative misconduct of a governmental official, the Court has given it tacit recognition in decisions holding that the complained of action did not rise to affirmative misconduct warranting the application of estoppel. For example, in *INS* v. *Hibi*,[39]

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sonavich v. *United States*, 335 F.2d 96 (3d Cir. 1964); *Simmons* v. *United States*, 308 F.2d 938 (5th Cir. 1962).

[36] *Schweiker* v. *Harsen*, 450 U.S. at 785, 101 S.Ct. 1468.

[37] *Id.* at 788, 101 S.Ct. at 1471.

[38] *See, Mendoza-Hernandez* v. *INS*, 664 F.2d 635, 639 (7th Cir. 1981); *Yang* v. *INS*, 574 F.2d 171, 174-75 (3d Cir. 1978); *Corniel-Rodriguez* v. *INS*, 532 F.2d 301, 306-07 (2d Cir. 1976); *Santiago* v. *INS*, 526 F.2d 488, 491-93 (9th Cir. 1975).

[39] 414 U.S. 5, 94 S.Ct. 19, 38 L.Ed.2d 7 (1973). This case involved a petition for citizenship brought by a native of the Phillipines who had served in the United States Army during World War II. The Nationality Act of 1940 provided that non-citizens such as Hibi, who had served in the armed services during World War II, could be naturalized without the usual requirements of residency and language proficiency. However, applicants were required to file naturalization petitions by December 31, 1946. Congress authorized the appointment of naturalization officers who travelled to various countries to assist such applicants. The immigration officer who was assigned to the Phillipines in 1945 was removed shortly thereafter. Hibi first arrived in the United States in 1964 and filed a petition for naturalization pursuant to the Naturalization Act of 1940. He argued that the government should be estopped from enforcing the December 31, 1946 deadline because of its failure to publicize his rights under the 1940 statute and its failure to station in the Phillipines a naturalization representative for the time such rights were available to him.

the Court asserted that, "while the issue of whether 'affirmative misconduct' on the part of the Government might estop it from denying citizenship was left open in *Montana* v. *Kennedy*, 366 U.S. 308, 314, 315, 81 S.Ct. 1336, 1340-1341, 6 L.Ed.2d 313 (1961), no conduct of the sort there adverted to was involved here."[40] Just last year the Court similarly held that a Social Security Administration employee's erroneous statement that a woman was ineligible for benefits, and his failure to advise her to apply for them, was less than affirmative misconduct and did not estop the Administration from denying her retroactive benefits.[41] The Court's rationale for this result is, *inter alia*, that the employee's failure to advise the woman was a breach of a manual guideline that did not constitute a regulation and did not have legally binding force. Moreover, petitioner failed to satisfy the procedural requirement of filing an application. Thus, petitioner failed to fulfill her statutorily imposed duty essential to receiving benefits.

Schweiker v. *Hansen*, *supra*, implies that one example of affirmative misconduct is the failure of a government employee to perform an act that is required by law. The Second Circuit explicitly stated what the Supreme Court implied. In *Corniel-Rodriguez* v. *I.N.S.*,[42] the court reversed a deportation order of an alien who inadvertently violated the Immigration and Nationality Act because American consular officers had failed to provide her with certain crucial information. Petitioner received an immigrant visa as the unmarried child of a United States resident, and the American consul failed to warn her that her visa would be automatically voided if she married before arriving in the United States. The official State Department regulations required the consular officer to provide this warning upon issuing the visa to petitioner. She married three days before she left her homeland, and the Immigration and Naturalization Service demanded her deportation after her arrival in the United States. The court found that the officer's

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[40] *Id.* at 8, 94 S.Ct. at 21.

[41] *Schweiker* v. *Hansen*, 450 U.S. at 788-89, 101 S.Ct. at 1470-1471.

[42] 532 F.2d at 306-07.

failure to comply "with an affirmatively required procedure" was an act of affirmative misconduct.[43] The court estopped the government from deporting the alien and declared that it refused "to sanction a manifest injustice occasioned by the government's own failures."[44]

While *Corniel-Rodriguez* found affirmative misconduct in the failure to perform a regulation-mandated action, other decisions emphasized equitable considerations in applying estoppel when government employees engaged in conduct on which petitioners relied to their detriment. Thus, the Seventh Circuit estopped the federal government from bringing an action under the Civil False Claims Act against a bank that had relied upon the advice of federal agents in preparing certain disputed claims applications.[45]

The Ninth Circuit applied estoppel against the government although the representation relied upon was unauthorized.[46] The facts in that case involved the submission of a noncompetitive oil and gas lease bid to a regional Land Management office. The Land Manager rejected that bid because he interpreted an Interior Department decision as prohibiting the issuance of leases where the bid designates unequal interests as did the bid in *Brandt*. The Land Manager's decision provided that the applicants could resubmit their corrected bid without losing the priority of their original bid. The Secretary of the Interior later ruled that the Land Manager's statement concerning continuity of priority of the original bid was unauthorized and wrong. He awarded the lease to another applicant who submitted his bid before applicants had resubmitted their bids. In estopping the Secretary from disavowing the Land Manager's unauthorized statement, the court declared:

> Not every form of official misinformation will be considered sufficient to estop the government.... Yet some forms of erroneous advice are so closely connected to the basic fairness of the administrative decision

[43] *Id.*

[44] *Id.* at 307.

[45] *United States* v. *Fox Lake State Bank*, 366 F.2d at 962.

[46] *Brandt* v. *Hickel*, 427 F.2d 53, 56-57 (9th Cir. 1970).

> making process that the government may be estopped from disavowing the misstatement.[47]

The court concluded that "estoppel . . . can properly be applied . . . where the erroneous advice was in the form of a crucial mistatement in an official decision."[48]

III.

The precepts and rationales of the aforementioned cases require this court to estop the government from recouping the reimbursements paid to CHS for expenses it incurred in employing CETA workers. The record shows that CHS was induced into submitting those expenses without offsetting the CETA grants by the affirmative instructions of the Secretary's agent, Travelers Insurance Companies. Not once, but on five separate occasions spanning over two years, Travelers advised CHS not to offset the CETA grants because they qualified as seed money exceptions to the offset requirements. Those instructions were affirmed by Travelers' approval of CHS' cost reports for those years.

It was reasonable for CHS to follow Travelers' instructions in this situation. CHS acted reasonably because it was adhering to the administrative process mandated by Medicare. Consequently, CHS was harmed by diligently fulfilling its government-imposed duties within the Medicare system. Moreover, the source of the harm suffered by CHS is the intermediary's failure to pass on CHS' inquiry to the proper authority and its providing the answer itself. These conclusions are supported by the findings of the PRRB:

> [T]he Board would like to acknowledge the Provider's argument concerning the role of the fiscal intermediary. The Regulations succinctly state that 'an important role of the fiscal intermediary, in addition to claims processing and payment and other assigned responsibilities, is to furnish consultative services to providers in the development of accounting and cost-finding procedures which will assure equitable payment under the program' [42 CFR 405.401(e)]. However, it should be

[47] *Id.* at 56.

[48] *Id.* at 57.

> emphasized that the role of the intermediary is not to establish the principles of reimbursement. This is the responsibility of the Secretary. Although the Provider acted in good faith in not offsetting salaries and fringe benefits by CETA funds, advice by the Intermediary cannot be a substitute for the opinion of the Secretary.[49]

Thus, CHS acted in good faith; Travelers was not authorized to decide whether the CETA grants should have been offset; this decision should have been made by the Secretary.

In light of those findings, the PRRB, and the District Court in affirming the PRRB's decision, was clearly erroneous in concluding that CHS unreasonably relied upon Travelers' instructions and in attributing liability to CHS. To hold CHS liable would place it in an untenable position. Appellants' brief expresses the dilemma posed by the decisions below:

> Query, if a provider must obtain the opinion of the Secretary, what is the provider supposed to do when the Intermediary fails to communicate a provider's request for that opinion? Is a provider supposed to circumvent the Secretary's mandated procedures? Further, what is the provider's remedy when the Intermediary acts in violation of the Intermediary's statutory requirement to serve as a channel of communications? Finally, how is a provider to know whether the information it is receiving is from the Intermediary or the Secretary?[50]

Appellants' argument then identifies the import of the District Court's decision:

> In view of these questions, if the District Court's construction of the reasonable reliance estoppel element is permitted to stand, it will drastically alter the reimbursement process under the Medicare Act contrary to Congressional intent. Under the District Court's construction, a provider subjects itself to substantial harm by dealing with an Intermediary at all. If the Intermediary decides to act without obtaining the

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[49] Joint Appendix at 93a.

[50] Appellant's Brief at 26.

> Secretary's opinion, as Travelers did here, the Secretary can then avoid liability by simply disavowing any responsibility for information given to the detriment of the provider. This is precisely what the Secretary is attempting to do here. Thus, a provider has no reason to deal with an Intermediary. The risk is too great. The District Court's ruling may cause providers to abandon Intermediaries in favor of direct dealing with the Secretary to avoid this risk thereby defeating the statutory reimbursement procedures and mandating a larger government workforce at a time when substantial reductions are mandated.[51]

We find that Travelers' unauthorized and erroneous advice to CHS is analogous to that of the Land Manager in *Brandt* v. *Hickel*, *supra*, which the court in that case found to be "so closely connected to the basic fairness of the administrative decision making process that the government may be estopped from disavowing the misstatement."[52]

Therefore, the intermediary's advice was not only erroneous, it constituted affirmative misconduct in relation to CHS. Reeves testified at the PRRB hearing that he knew of no official policy concerning the CETA grants at the time Wallach asked for guidance.[53] He also testified that the procedure intermediaries followed in getting answers to questions that are not covered in the administrative guidelines is to pass them on to the regional office of the Bureau of Health.[54] Although CHS fulfilled its administrative duties in presenting its question to Travelers, Travelers knowingly violated statutory and procedural guidelines in failing to communicate it to the proper authority within HHS from June 1975 to August 1977. Reeves deliberately chose instead to make that policy decision on his own. Reeves finally did forward CHS' inquiry to the Bureau of Health in August 1977. Had he done this in the first in-

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[51] *Id.* at 26-27.

[52] *Brandt* v. *Hickel*, 427 F.2d at 56.

[53] Transcript at 0197-0198.

[54] Transcript at 0179. Travelers was obliged by statute and by its contract with the Secretary to "serve as a channel of communication from providers of services to the Secretary." 52 U.S.C. § 1395h (a)(2)(A) and Transcript at 0289.

stance CHS would not have been misled. The harm to CHS was thus caused by the failure of the government's agent to perform a legally binding procedure.

It appears, therefore, that the intermediary's behavior in this case is similar to the consul officer's failure to comply "with an affirmatively required procedure" that the Second Circuit held constituted affirmative misconduct necessitating the application of estoppel against the government.[55] To impose liability on CHS for its good faith compliance with Medicare prescribed procedures and to allow the government to escape liability created by its agent's violation of those procedures would, in effect, repudiate the Medicare administrative process that was established by Congress.

This case is distinguishable, therefore, from five recent cases in which the Supreme Court found that the estoppel doctrine did *not* apply to the government.[56] Those cases provide no precedential support for the preclusion of the estoppel doctrine in this case.

In the earliest case, *Federal Crop Insurance Corp.* v. *Merrill*, *supra*, respondents brought an action to enforce a contract they entered into with a government agency, the Federal Crop Insurance Corporation, through its local agent to insure spring wheat that they were planting on winter wheat acreage. However, the Corporations' Wheat Crop Insurance Regulations clearly "precluded insurance coverage for spring wheat reseeded on winter wheat acreage."[57] The Court declared:

> not only do the Wheat Regulations limit the liability of the Government as if they had been enacted by Congress directly, but they were in fact incorporated by

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[55] *Corniel-Rodriguez* v. *INS*, 532 F.2d at 306-07.

[56] *Immigration and Naturalization Service* v. *Miranda*, ___ U.S. ___, 103 S.Ct. 281, 74 L.Ed.2d 12 (1982); *Schweiker* v. *Hansen*, *supra*; *INS* v. *Hibi*, *supra*; *Montana* v. *Kennedy*, *supra*; *Federal Crop Insurance Corporation* v. *Merrill*, 322 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947).

[57] *Federal Crop Insurance Corporation* v. *Merrill*, 332 U.S. at 386, 68 S.Ct. at 4.

reference in the application, as specifically required by the Regulations.[58] [footnotes omitted]

The Supreme Court refused to enforce the contract and held the government liable on respondents' claim for crop damage due to drought. It held that "the Wheat Crop Insurance Regulations were binding on all who sought to come within the Federal Crop Insurance Act, regardless of actual knowledge of what is in the Regulations or of the hardship resulting from innocent ignorance."[59]

Perhaps the dividing line between the majority and the dissent in the instant case is our different readings of the *Merrill* case. We would not categorize the dissent's construction of that case as implausible, but we believe that the facts of *Merrill* are so different from those of this case that *Merrill* is not controlling and possibly irrelevant. With a closely divided court in *Merrill* the majority of five indicated that had the plaintiffs only gone to the basic documents—the regulations—they would have been able to ascertain the limited coverage under the Wheat Crop Insurance Regulations. In contrast to *Merrill*, in this case there is no "clear meaning of the regulation;" in fact there was no regulation in force at the time. Thus, there was no source to which CHS could have gone to ascertain whether the government agent's advice was wrong. This, we think, is the critical difference that makes *Merrill* inapplicable to the instant case.

In *INS* v. *Miranda*, *supra*, petitioner was a citizen of the Philippines who came to the United States and married a United States citizen after his temporary visitor's visa expired. He filed an application with the Immigration and Naturalization Service to adjust his status to that of a permanent resident alien. His wife, whose name is Milligan, simultaneously filed a petition requesting the INS to issue an immigrant visa to Miranda. The Court noted that, because § 245(a) of the Immigration and Naturalization Act conditions the granting of permanent resident status to an alien on the immediate availability of an immigrant visa, Milligan's petition would have satisfied this condition.

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[58] *Id.* at 385, 68 S.Ct. at 3-4.

[59] *Id.*

However, the INS failed to act on Miranda's petition and Milligan's application for eighteen months. During this time, Miranda and Milligan were divorced. Following the divorce Milligan withdrew her application. The INS thereafter denied Miranda's petition and ordered his deportation because he was no longer eligible for a permanent immigrant visa owing to his divorce. Miranda appealed on the theory that the government should be estopped from deporting him because its failure to act on his petition and Milligan's application for eighteen months was so unreasonable, unfair and unjust that it was affirmative misconduct.

The Supreme Court rejected Miranda's appeal. It found that the INS' failure to process Milligan's application more promptly did not amount to affirmative misconduct. Its reason for this conclusion is that Miranda failed to present evidence to show that the eighteen months that INS used to investigate the validity of Miranda's marriage was unwarranted. Therefore, the evidence did not establish that the government failed to fulfill its duty.

Unlike *Miranda*, the government agent's misconduct in this case is clear. The duty imposed upon him by statute and by Medicare regulations was unambiguous; this duty was known to him; he failed to peform it.

In *Schweiker*, the Court in referring to Mr. Connelly, field representative of the Social Security Administration stressed that:

> at worst, Connelly's conduct did not cause respondent to take action, ... or fail to take action, ... that respondent could not correct at any time.[60]

Unlike *Schweiker*, the advice of the government agent in this case caused CHS to take action—to provide to the ill and to the poor more medical services than it otherwise would have because of the additional financial resources which CETA grants made possible if reimbursement of CETA grants was not required.[61] CHS failed to eliminate those additional human services because, over a period of two and a half years, it relied on the explicit assurances of

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[60] *Schweiker* v. *Hansen*, 450 U.S. at 789, 101 S.Ct. at 1471.

[61] Transcript at 0146-0147.

the only authorized representative of the government with whom CHS was supposed to consult—Mr. Reeves of Travelers. Finally, this is an error that CHS "could not correct at any time." It is irremediable because the government is not simply requesting prospective changes; instead, it is pressing for the recoupment of funds that have already been spent and which are not otherwise available. The testimony in this case suggests that the "correction" could very well mean that CHS will close its doors or drastically reduce its services to ill and poor people if it is forced to repay the Secretary amounts equal to CETA grants CHS received. In fact, the trial judge, in granting the Temporary Restraining Order, held:

> 4. That CHS is a non-profit organization whose operation is dependent upon government funding and which has exhausted its borrowing capability and has no other source of funds with which to meet its payroll on August 15, 1978, other than the aforesaid funds due it from HEW;
>
> 5. That there is danger of immediate and irreparable injury being caused to plaintiff CHS, its employees and to the public which they serve, for the reason that the actions of the defendant Secretary will likely cause CHS to cease or severely curtail operations as a home health service agency, thereby threatening the health and lives of the individual plaintiffs and others similarly situated;[62]

In the earliest case, *Montana* v. *Kennedy; supra*, petitioner sought to estop the government from deporting him after residing in the United States for over fifty years. In resisting his deportation in 1958, petitioner argued, *inter alia*, that he was born outside of the United States because his mother had been prevented from leaving Italy prior to his birth by an American Consular Officer in Italy who mistakenly told his mother that she could not return to the United States in her pregnant condition and refused to issue her a passport while she was pregnant.[63] Petitioner as-

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[62] Joint Appendix at 70a.

[63] *Montana* v. *Kennedy*, 366 U.S. at 314, 81 S.Ct. at 1340.

serted that the government should be estopped from deporting him "because of its own misconduct."[64]

The Court rejected petitioner's claim. It noted that the law was clear in 1906, and neither the United States nor Italy required an American passport to leave Italy and to travel to the United States. Since petitioner's mother was permitted by United States and Italian law to leave Italy, the Supreme Court characterized the consular officer's statement as merely "well meant advice" that a pregnant woman "cannot [return to the United States] in that condition."[65] Consequently, the court held that the advice fell "far short of misconduct."[66] Petitioner's mother could have ascertained her legal rights by independent inquiry. Unlike *Montana*, appellant CHS in the case before us had no alternative means of ascertaining the status of CETA grants. No regulation, congressional directive or administrative guideline existed that determined whether or not CETA grants should be offset against Medicare reimbursements. Therefore, we find that the erroneous advice that was given to CHS by the *only* governmental source of information available to it is affirmative misconduct under the unique circumstances of this case.

Finally, in *INS* v. *Hibi*, *supra*, estoppel was denied because the Court did

> not think that the failure to fully publicize the rights which Congress accorded under the Act of 1940, or the failure to have stationed in the Phillipine Islands during all of the time those rights were available an authorized naturalization representative, can give rise to an estoppel against the government.[67]

In contrast to *Hibi*, *supra*, the governmental officer authorized by the statute to assist petitioner in the instant case to ascertain its rights was available; petitioner consulted him; and the officer gave erroneous advice on which petitioner relied to its great financial detriment. Moreover, the government conduct in *Hibi* was in the nature of an

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[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] 414 U.S. at 8-9, 94 S.Ct. at 21-22.

omission. Here, the governmental conduct was a clear act of commission which, on the facts of this case, rises to the level of affirmative misconduct.

IV.

The Court wishes to emphasize the injustice to CHS and the people it serves if it is required to refund the alleged overpayments. The extra monies were used to expand CHS' services to meet serious human needs. This case, therefore, is distinguishable from others that involve possible overtones of fraud or profiteering by submitting to Medicare inflated cost reports for unnecessary services. No one questions the reasonableness of the amounts paid to, or the necessity of employing CETA workers. The only people who profited were the weak, the lame and the ill who comprised CHS' impoverished and medically underserved beneficiaries. They would be the persons injured if CHS were required to repay the funds in question. In granting CHS' motion for a Temporary Restraining Order, the District Court recognized this harm when it asserted that recoupment of the CETA funds "will likely cause CHS to cease or severely curtail operations as a home health service agency, thereby threatening the health and lives of the individual plaintiffs and others similarly situated."[68] This Court, like the Second Circuit, refuses to sanction such a manifest injustice occasioned by the Government's own misconduct.[69]

With all due respect, we submit that the dissenting opinion is quite wide of the judicial mark in at least two respects. First, it alleges that we have been "snared by the trap" of "emotion and ideology" because we "approve ... the social program involved" and that we would not have "countenanced governmental estoppel" if we were merely dealing with "a defense contractor" claiming to retain seven million dollars. Dissenting opinion at 628, n.1. Candidly we believe that under our system of law all litigants are entitled to equal justice—whether wealthy or poor, whether defense contractors or non-profit health agencies, whether

[68] Joint Appendix at 70a.

[69] *Corniel-Rodriguez* v. *I.N.S.*, 532 F.2d at 307.

stockholders or medicare patients. Necessarily, when determining the issue of detrimental reliance we had to discuss the facts—thus the plight of the Community Health Services, their economic injury, their reliance and the impact of the government's misrepresentation on both CHS and the ill persons whom they serve. The dissent, therefore, is simply incorrect in asserting that this decision is an unprincipled expression of "emotion and ideology." Whether it is a defense contractor or an eleemosynary institution is not critical. Our adjudication is predicated on our finding of the affirmative misconduct of the government's agent; the petitioner's injury and the petitioner's reasonable reliance upon the government's agent's advice.

Secondly, the dissenting opinion is based upon a novel, but erroneous statement of the law of governmental estoppel. The dissent asserts that the petitioner must qualify for a substantive entitlement before governmental estoppel lies. *None* of the cases cited by the dissent embrace this theory; none of these decisions turn on the fact that petitioner had, or did not have, a substantive entitlement. In none of the cases has the Supreme Court used the term "substantive entitlement," nor has the Supreme Court uttered the theory of the dissent under any other label. Nor are we aware of any cases in which substantive entitlement was a controlling factor. The dissent, therefore, errs in emphasizing substantive entitlement rather than the nature of the government agent's conduct and the petitioner's reasonable and detrimental reliance upon that conduct.

Indeed, the Supreme Court's decision in *Schweiker, supra*, as the decision here, turned on the nature of the government employees' conduct and whether the petitioner demonstrated reasonable, detrimental reliance. In *Miranda, supra*, the Supreme Court explicitly refused to apply estoppel against the government precisely because the governmental action fell "far short of"[70] affirmative misconduct. The decision the dissent identifies as controlling precedent in this case, *Federal Crop Insurance Corporation* v. *Merrill, supra*, actually turned on the reasonable-

[70] *INS* v. *Miranda*, ___ U.S. at ___, 103 S.Ct. at 281-282.

ness of respondents' reliance on the government agent's advice, not on whether they had a substantive entitlement to the insurance. The Court decided against respondents because it held them responsible for knowing that the Corporation's regulations precluded the insurance coverage for which they had applied. In all these cases, the question of whether petitioner had a substantive entitlement was not germane.

Moreover, this case does not present a question of substantive entitlement. We do not have to determine, and we do not decide, if petitioner would be entitled to the funds in question if the government could not be estopped from recouping them. This case presents instead a question of detrimental reliance upon the affirmative misconduct of a government agent. Whether or not CHS is otherwise entitled to the monies is not relevant. CHS expended monies because of and in reasonable reliance upon, an illegally made and erroneously founded decision of a representative of the government. Therefore, the government should not now be allowed to reclaim those monies.

CONCLUSION

We hold that the District Court erred in concluding that equitable estoppel does not lie against the Secretary of Health and Human Services on the facts of this case. We therefore will reverse the judgment of the district court which granted appellee's motion for a summary judgment and remand these proceedings to the district court with the direction that it grant appellant's petition to estop the Secretary from recouping the alleged overpayment.

MEANOR, District Judge, dissenting.

Part I of the majority opinion quite adequately sets forth the facts and I need not repeat them. I cannot, however, accept the majority's conclusion that the government is estopped from claiming reimbursement for the overpayment made here. I recognize that this case has sympathetic

overtones.[1] However, if there is any basis for estopping the government—an action that the Supreme Court has never expressly taken[2]—this case does not provide it.

It is true that, particularly in the last decade, the federal judiciary has increasingly applied estoppel against the government.[3] I do not believe, however, that the government may be estopped where the estoppel would render to the opponent a benefit to which he was never substantively entitled. It may be that a valid estoppel can lie where affirmative government misconduct[4] induces a procedural default,

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[1] In *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947), the Supreme Court recognized that it was dealing with a case which involved sympathetic overtones. Indeed, the court stated that "[t]he case no doubt presents phases of hardship." *Id.* at 383, 68S.Ct at 2. Nevertheless, the court was not moved by this factor, and held that the government should not be estopped. *Id.* at 386, 68S.Ct. at 4. I believe that the majority in the instant case has been snared by the trap which the Court in *Merrill* managed to avoid. The majority has allowed emotion and ideology to enter into its decision. I am convinced that if this case involved a defense contractor who worked on a cost plus basis, and who claimed a right to retain seven million dollars, as opposed to the seventy thousand dollars involved in the instant case, the majority would never countenance government estoppel. In short, I believe that the majority was influenced by the fact that it approves the social program involved. This sort of reasoning results in ad hoc decision-making which more appropriately is left to Congress.

[2] The issue of government estoppel has arisen in six Supreme Court cases: *Immigration & Naturalization Serv.* v. *Miranda*, ___ U.S. ___, 103 S.Ct. 281, 74 L.Ed.2d 12 (1982); *Schweiker* v. *Hansen*, 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981); *United States Immigration & Naturalization Serv.* v. *Hibi*, 414 U.S. 5, 94 S.Ct. 19, 38 L.Ed.2d 7 (1973); *Montana* v. *Kennedy*, 366 U.S. 308, 81 S.Ct. 1336, 6 L.Ed.2d 313 (1961); *Moser* v. *United States*, 341 U.S. 41, 71 S.Ct. 553, 95 L.Ed. 729 (1951); *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947). In none of these cases has the Supreme Court *expressly* estopped the government.

[3] *E.g.*, *Corniel-Rodriguez* v. *Immigration & Naturalization Serv.*, 532 F.2d 301 (2d Cir.1976); *Brandt* v. *Hickel*, 427 F.2d 53 (9th Cir.1970); *Walsonavich* v. *United States*, 335 F.2d 96 (3d Cir.1964).

[4] It is not altogether clear whether affirmative misconduct is required to estop the government, or whether mere negligence will suffice. In *Moser* v. *United States*, 341 U.S. 41, 71 S.Ct. 553, 95 L.Ed.

thus depriving one of the substantive entitlement.[5] It may also be that the doctrine of estoppel properly can be used where affirmative government misconduct induces action which thereafter prevents one from qualifying for a substantive entitlement.[6] But I do not believe the government can be estopped where the result would be to give a benefit to which there never was any entitlement.

For me, *Federal Crop Insurance Corp.* v. *Merrill*[7] is controlling. Respondents there applied to the petitioner federal agency for crop insurance on 460 acres of spring wheat, 400 acres of which was to be reseeded winter wheat. Respondents were advised that the entire crop was insura-

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729 (1951), discussed in text *infra*, the Court upheld a grant of United States citizenship where the foreign citizen was not warned by the United States that by claiming military exemption he would lose his right to become a citizen. Thus, the government's negligence in failing to warn the foreign citizen prevented the government from denying the person citizenship. Although the Court disclaimed reliance upon an estoppel theory, many believe this to be an estoppel case. *See infra* note 10. Similarly, in *Corniel-Rodriguez* v. *Immigration & Naturalization Serv.*, 532 F.2d 301 (2d Cir.1976), the government's failure to warn was held sufficient to estop the government. Contrary to the majority's reading of subsequent Supreme Court cases, *see* majority opinion at 621, I believe that these cases indicate that something more than mere negligence is required before affirmative misconduct will be found. *E.g.*, *Schweiker* v. *Hansen*, 450 U.S. 785, 788-89, 101 S.Ct. 1468, 1470-1471, 67 L.Ed.2d 685 (1981) ("we are convinced that Connelly's conduct—which the majority conceded to be less than 'affirmative misconduct,'...—does not justify the abnegation of that duty"); *United States Immigration & Naturalization Serv.* v. *Hibi*, 414 U.S. 5, 8, 94 S.Ct. 19, 21, 38 L.Ed.2d 7 (1973) ("While the issue of whether 'affirmative misconduct' on the part of the Government might estop it from denying citizenship was left open in *Montana* v. *Kennedy*, ... no conduct of the sort there adverted to was involved here"); *Montana* v. *Kennedy*, 366 U.S. 308, 314-15, 81 S.Ct. 1336, 1340-1341, 6 L.Ed.2d 313 (1961). *See Oki* v. *Immigration & Naturalization Serv.*, 598 F.2d 1160, 1162 (9th Cir.1979).

[5] *E.g.*, *Miranda* v. *Immigration & Naturalization Serv.*, 638 F.2d 83 (9th Cir.1981) (United States citizenship jeopardized because petitioner married before entering country).

[6] *E.g.*, *Walsonavich* v. *United States*, 335 F.2d 96 (3d Cir.1964) (taxpayer lured into not filing refund claim and claim subsequently barred by statute of limitations).

[7] 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947).

ble and the insurance was issued. The entire crop was later destroyed by drought, and respondents learned that valid regulations precluded crop insurance for reseeded wheat. In refusing to estop the government from denying liability the Supreme Court stated:

> Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority.[8]

The Court further stated that the limitation of insurance coverage was pursuant to valid regulations, and that all persons are charged with knowledge of rules and regulations in the Federal Register.[9]

The facts of *Merrill* parallel those here. In both cases erroneous representations were made by government agents; in both cases there was reliance; and in both cases damage was incurred because of that reliance. Finally, in both cases there never was any entitlement to secure a benefit from the government. The only difference between *Merrill* and this case is that here the plaintiffs have received the funds in dispute, whereas in *Merrill* the insurance proceeds never were paid. I can think of no way in which this factual difference can lead to a principled distinction. It is also important to note that in *Merrill* the Court noted "the duty of all courts to observe the conditions defined by Congress for charging the public treasury."[10]

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[8] *Id.* at 384, 68 S.Ct. at 3.

[9] Subsequent cases, however, seem to hold that persons are not held to have knowledge of all statutes and regulations. *See, e.g. Moser* v. *United States*, 341 U.S. 41, 71 S.Ct. 553, 95 L.Ed. 729 (1951); *Corniel-Rodriguez* v. *Immigration & Naturalization Serv.*, 532 F.2d 301 (2d Cir.1976).

[10] 332 U.S. at 385, 68 S.Ct. at 3.

The Supreme Court has never, except perhaps in one instance, countenanced the use of estoppel against the government. *Moser* v. *United States*[11] may be analyzed as a case in which an estoppel was applied against the government, although the court did not rely on the doctrine. Moser, a Swiss citizen residing in the United States, applied during World War II for exemption from military service pursuant to a treaty between the United States and Switzerland. By statute it was provided that a claim of exemption from military service prevented such a claimant from becoming a citizen of the United States. The usual form on which such an exemption was claimed stated explicitly that the claim would bar the claimant from obtaining citizenship. The Swiss legation, however, took the position that such a bar from citizenship was inconsistent with the rights under the treaty. The State Department, together with Selective Service Headquarters and the Swiss legation, worked out a revised form which omitted reference to debarment from citizenship. Moser, who had claimed the exemption, was later granted citizenship after the district court explicitly found that, had he known his claim of exemption from military service would debar him from citizenship, he would have elected to serve in the armed forces of the United States. The Supreme Court upheld the grant of citizenship on the ground that Moser had not made an intelligent waiver of his right to obtain citizenship. The Court, however, expressly disclaimed reliance on an estoppel theory. Nevertheless, many courts and commentators believe that the *Moser* Court was in reality applying estoppel principles.[12] I believe the result in *Moser* to be correct, regardless of whether a waiver or estoppel theory is relied upon. In *Moser*, the Swiss citizen could easily have become an American citizen had he not claimed the exemption. Thus, the government misconduct induced action on the part of the Swiss citizen which prevented him from qualifying for a substantive entitlement. In this re-

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[11] 341 U.S. 41, 71 S.Ct. 553, 95 L.Ed. 729 (1951).

[12] *E.g.*, *Air-Sea Brokers, Inc.* v. *United States*, 596 F.2d 1008, 1011 (C.C.P.A.1979); K. Davis, Administrative Law Text 345 (3d ed. 1972).

spect, *Moser* differs from *Federal Crop Insurance* in that the respondent in the latter case had no substantive entitlement and was not deprived of qualifying for one.

One recent case is particularly instructive in analyzing the issue of government estoppel. In *Hansen* v. *Harris*,[13] the claimant became eligible for social security benefits in June 1974. The claimant failed to file a written application, however, because a Social Security Field Representative supplied her with misinformation, and did not urge her to file a written claim. The Court of Appeals for the Second Circuit held that the government was estopped from denying benefits in view of the government's misconduct. The court began its analysis with the proposition that "[t]he Government may sometimes be estopped from enforcing its rules, based on the conduct of its agents."[14] The court went on to distinguish between procedural requirements and substantive eligibility for the program in question. Thus, the question becomes whether "[i]t would fulfill the fundamental legislative goal to grant appellee the benefits she seeks."[15] Because the appellee was found to be substantively entitled to the benefits, the court of appeals held the government estopped from denying benefits. The court limited its holding to cases where "(a) procedural not a substantive requirement is involved and (b) an internal procedural manual or guide or some other source of objective standards of conduct exists and supports an inference of misconduct by a Government employee."[16] In his dissenting opinion, Judge Friendly indicated that *Federal Crop Insurance* mandated a holding that the federal government can *rarely* be estopped. Judge Friendly stated that to estop the government means that the door to the federal fisc is held wide open, and that government agents will have to follow every regulation to the last detail. As for the substance/procedure distinction, Judge Friendly found the ar-

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[13] 619 F.2d 942 (2d Cir.1980), *rev'd*, *Schweiker* v. *Hansen*, 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981).

[14] *Id.* at 947.

[15] *Id.* at 948.

[16] *Id.* at 949.

gument to be hollow. Judge Friendly believed that all conditions on receiving benefits are substantive "in the sense that . . . they significantly affect the result, not 'merely the manner or means by which a right to recover . . . is enforced.'"[17]

In *Schweiker* v. *Hansen*,[18] the Supreme Court reversed the court of appeals in a per curiam opinion. The Court began its opinion by stating that it agreed with Judge Friendly, who, it must be remembered, stated that the government should rarely be estopped. The Court stressed "'the duty of all courts to observe the conditions defined by Congress for charging the public treasury.'"[19] The court found that the government agent's failure to comply with the Claims Manual by not recommending that the claimant file a written application did not constitute affirmative misconduct. As for the substance/procedure distinction, the Court stated:

> Finally, the majority's distinction between respondent's "substantiv[e] eligib[ility]" and her failure to satisfy a "procedural requirement" does not justify estopping petitioner in this case. Congress expressly provided in the Act that only one who "has filed application" for benefits may receive them, and it delegated to petitioner the task of providing by regulation the requisite manner of application. A court is no more authorized to overlook the valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits.[20]

It is important to note that the Court did not reject the substance/procedure distinction. The Court merely stated that under the facts of this case, the substance/procedure distinction did not warrant estopping the government. The claimant, however, could be said to have had a substantive entitlement to benefits in 1974. The claimant was deprived

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[17] *Id.* at 957 (Friendly, J., dissenting) (quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 109, 65 S.Ct. 1464, 1470, 89 L.Ed. 2079 (1945)).

[18] 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981).

[19] *Id.* at 788, 101 S.Ct. at 1470 (quoting *Federal Crop Insurance*, 332 U.S. at 385, 68 S.Ct. at 3-4).

[20] *Id.* 450 U.S. at 790, 101 S.Ct. at 1471-1472.

of those benefits because of the misrepresentations of the government. What the Supreme Court seems to be saying, however, is that the requirement that the application be written is substantive, not procedural, and that the claimant had no substantive entitlement because a written application was never filed. This was the position adopted by Judge Friendly. As far as the instant case is concerned, however, the Supreme Court opinion supports my analysis. The *Hansen* opinion in no way casts doubt upon my theory that where there is no substantive entitlement, the government cannot be estopped. Indeed, in *Hansen*, the court found no substantive entitlement, and therefore did not estop the government. What the *Hansen* Court in reality does is to define when there is a substantive entitlement. I stated earlier that a valid estoppel *may* lie where affirmative government misconduct induces a procedural default, thus depriving one of a substantive entitlement, or where affirmative government misconduct induces action which thereafter prevents one from qualifying for a substantive entitlement. The *Hansen* opinion casts doubt upon whether procedural defaults can be the basis of governmental estoppel where the default was caused by government misrepresentations. *Hansen* seems to indicate that such defaults act to deprive the claimant of any substantive entitlement. In any case, resolution of this issue must await another day. In the instant case there can be no doubt that the appellant never had any substantive entitlement. Under *Federal Crop Insurance* and *Hansen*, I believe that the government clearly cannot be estopped.

The issue of government estoppel has been considered by numerous courts of appeal. The majority relies heavily upon two cases in particular. In *Corniel-Rodriguez* v. *Immigration & Naturalization Service*,[21] the petitioner applied for a special immigrant visa, and the United States consulate in Santo Domingo issued such a visa on August 17, 1967. Once in the United States, deportation proceedings were commenced, however, because petitioner had been married three days before her departure from the Do-

[21] 532 F.2d 301 (2d Cir. 1976).

minican Republic. A provision of the Immigration and Nationality Act provides that the exemption for children of special immigrants[22] is unavailable if the alien is married at the time of application for the visa or at the time of admission into the United States.[23] A valid regulation states: "The consular officer shall warn an alien [issued a visa as a child], when appropriate, that he will be inadmissible as such an immigrant if he is not unmarried at the time of application for admission."[24] Contrary to this regulation, the United States consulate did not advise petitioner of the consequences of marriage before entry into the country. So as to avoid a "manifest injustice," the Court of Appeals for the Second Circuit estopped the government from deporting the petitioner.

In *Brandt* v. *Hickel*,[25] appellants submitted a non-competitive oil and gas lease offer to the Los Angeles office of the Bureau of Land Management. Because the issuance of leases is prohibited where the offer form designates unequal interests, the offer was rejected. Appellants were given the right to substitute within thirty days new order forms eliminating any reference to unequal interests without losing their priority. Because of this promise, appellants did not appeal the decision of the Bureau of Land Management. In reality, the promise that appellants would not lose their priority was not authorized by statute or regulation. The court of appeals held that the "crucial misstatement" in the official decision of the Bureau of Land Management was sufficient to estop the government. Thus, appellants were granted a right to appeal from the land office decision, and were thereby entitled to attempt to preserve their priority.

In discussing the above cases, the majority concentrates on the fact that there was affirmative misconduct and that equitable considerations mandated estopping the government. The majority, however, fails to acknowledge that in

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[22] 8 U.S.C. § 1182(a)(14)(1976).

[23] *See id.* § 1101(b)(1).

[24] 22 C.F.R. § 42.122(d) (modified in 1965).

[25] 427 F.2d 53 (9th Cir.1970).

both these cases the appellants had a substantive entitlement.[26] In *Corniel-Rodriguez*, the petitioner had a right to become an American citizen. Petitioner was deprived of this right by the government's failure to warn as to the consequences of marriage before entry into the country. In *Brandt*, appellants had a right to appeal the decision of the Bureau of Land Management. This right was lost, however, because of affirmative misrepresentation on the part of the government. The majority states: "We find that Travelers' authorized and erroneous advice to CHS is analogous to that of the Land Manager in *Brandt* v. *Hickel*, *supra*, which the court in that case found to be "so closely connected to the basic fairness of the administrative decision making process that the government may be estopped from disavowing the misstatement."[27] Fairness may have dictated that the government be estopped in *Brandt*. Fairness does not dictate that the government be estopped where, as in the instant case, the appellant never had any substantive entitlement to the benefits. Where no substantive entitlement exists, to estop the government amounts to no more than a court authorized raid on the public treasury. Thus, the cases relied upon by the majority provide no support for the notion that the government should be estopped where no substantive entitlement exists. It is true that there are some cases where the courts have estopped the government even though no substantive entitlement existed.[28] In my opinion, courts which have so held are simply wrong.

As stated earlier, I believe that the outcome in this case is controlled by *Federal Crop Insurance*. It seems to me that *Federal Crop Insurance* was recently reaffirmed by the Supreme Court in *Schweiker* v. *Hansen*. In *Hansen*,

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[26] Even under the *Hansen* definition of "entitlement," it is clear that appellants had substantive entitlements.

[27] Majority opinion at 623.

[28] *E.g.*, *United States* v. *Lazy FC Ranch*, 481 F.2d 985 (9th Cir. 1973); *Dana Corp.* v. *United States*, 470 F.2d 1032 (Ct.Cl.1972); *United States* v. *Georgia-Pacific Co.*, 421 F.2d 92 (9th Cir.1970); *Schuster* v. *Commissioner of Internal Revenue*, 312 F.2d 311 (9th Cir.1962)

the Court expressly agreed with the position taken by Judge Friendly in his dissenting opinion in the court of appeals. In his dissent, Judge Friendly adhered strictly to the precepts of *Federal Crop Insurance*. Indeed, Judge Friendly was of the opinion that the government should rarely be estopped. Although the Court in *Hansen* approved Judge Friendly's position, it is doubtful whether it meant to go as far as to say that the government can never be estopped, in view of the fact that the *Hansen* Court went on to find that no affirmative misconduct was involved.[29] Nevertheless, *Hansen* indicates that the Supreme Court views government estoppel with disfavor, and certainly provides no support for the majority opinion. Appellant in the instant case had no substantive entitlement, and thus under *Federal Crop Insurance* and *Hansen* the government cannot be estopped.

For the foregoing reasons, I respectfully dissent.[30]

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[29] Indeed, since *Hansen* at least one court of appeals has held the government estopped. *E.g.*, *Miranda* v. *Immigration & Naturalization Serv.*, 673 F.2d 1105 (9th Cir.), *rev'd*, ___ U.S. ___, 103 S.Ct. 281, 74 L.Ed.2d 12 (1982) (no affirmative misconduct).

[30] Apellants advance additional arguments in support of reversal. Since the majority does not reach them, I see no necessity for a discussion of them in dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5098

COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., A NON-PROFIT CORPORATION, ADA WERNER, AN INDIVIDUAL, FRANK E. WERNER, AN INDIVIDUAL, AND SHIRLEY SORGER, AN INDIVIDUAL, APPELLANTS,

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, AND THE TRAVELERS INSURANCE COMPANIES, A CORPORATION, APPELLEES.

(D.C. Civil No. 78-74 Erie)

COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., A NON-PROFIT CORPORATION, APPELLANT,

v.

PATRICIA ROBERTS HARRIS, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, AND THE TRAVELERS INSURANCE COMPANIES, A CORPORATION, APPELLEES.

(D.C. Civil No. 80-056B Erie)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges*, and MEANOR, *District Judge*.*

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*Honorable H. Curtis Meanor, United States District Court for the District of New Jersey, sitting by designation, was on the original panel but did not participate in this order.

The petition for rehearing filed by Appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Garth would grant the petition for rehearing essentially for the reasons expressed in Judge Meanor's dissenting panel opinion.

By the Court,

/s/ A. Leon Higginbotham, Jr.
Circuit Judge

Dated: FEBRUARY 14, 1983

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 80-56 Erie

COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., A NON-PROFIT CORPORATION, PLAINTIFF

v.

PATRICIA ROBERTS HARRIS, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND THE TRAVELERS INSURANCE COMPANIES, A CORPORATION, DEFENDANTS.

MEMORANDUM OPINION

On April 10, 1980, Community Health Services (CHS), a nonprofit corporation existing under the laws of Pennsylvania, filed a complaint under § 1878(f)(1) of the Social Security Act (the Act), 42 U.S.C. § 1395oo(f)(1), to review a final decision of the Secretary of the Department of Health and Human Services (the Secretary) disallowing certain claims for Medicare reimbursement for the years 1976 and 1977.[1] This decision was rendered by the Department's Provider Reimbursement Review Board (PRRB) on March 12, 1980 following a formal hearing.

Defendants moved for summary judgment on August 25, 1980 and plaintiff responded with a similar motion on September 17, 1980. The matter was argued orally before the court in Erie on October 30, 1980 and the matter is now ready for disposition.

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[1] On June 3, 1980 this action was consolidated with C.A. No. 78-74 Erie, a case filed on July 12, 1978 based on the same facts. In that case, the court denied motions to dismiss and for summary judgment pending further discovery and agency action. By stipulation of counsel, the Secretary agreed to cease recoupment of the overpayment and refund all monies already recouped from plaintiff pending resolution of this action.

BACKGROUND

Without delving into great detail concerning the statutory scheme for Medicare funds, some explanation of the parties and the plan is necessary. Plaintiff is a "home health agency" as defined in § 1861(o) of the Act, 42 U.S.C. § 1395x(o), and is a "provider" of home health services within the meaning of § 1851(a), 42 U.S.C. § 1395x(u). Defendant Harris is the federal officer responsible for the administration of the Social Security Act. Defendant, Travelers, acted as a fiscal"intermediary" under § 1816, 42 U.S.C. § 1395h and, as such, acted as an agent of the government in making payments to providers of home health services under Parts A and B of Title XVIII of the Act. The primary duty of the intermediary is the processing of claims and payment of funds to the provider.

Beginning in 1966, CHS entered into an agreement with the Secretary to provide home health services to eligible individuals under the Act and the Secretary agreed to reimburse CHS the reasonable cost of such services. Since that time, CHS has been dealing with the Secretary's fiscal intermediary, providing it with all cost related information required. In April of 1975, CHS entered into a series of contracts with the Mercer County Consortium Services, Inc., by which CHS was to employ participants in a program under the Comprehensive Employment and Training Act of 1963 (CETA), 29 U.S.C. § 801 *et seq.* CETA established programs designed to provide job training opportunities for unemployed individuals by allocating funds to state or local governments which, in turn, arrange manpower programs. Under the terms of the CETA grants, CHS was to employ participants in the program furnished by the regional CETA administration and was reimbursed by CETA for the salaries and fringe benefits paid to those employees. The purpose of the CETA program, as stated in the contract signed by CHS, is "to provide work training and experience for the purpose of enhancing the future employability of participants in obtaining a planned occupational goal."

The administrator of CHS contacted a representative of the intermediary to discuss the treatment of the CETA grants for purposes of Medicare reimbursements. While there was no official government policy on the treatment of CETA funds, CHS was informed by the medicare manager of the intermediary, Michael J. Reeves, that the CETA funds qualified as "seed money" pursuant to § 612.2 of the Provider Reimbursement Manual (HIM-15-1) and that the actual cash value of CETA employees need not be offset against reimbursable costs. CHS prepared its cost reports on this basis and these reports were approved by the intermediary for the years 1975, 1976 and 1977. In effect, CHS was being paid twice by the government for the salaries of CETA participants—the Secretary was charged for the salaries of these employees as part of the reasonable cost of providing medical care while CETA was paying for these salaries from government grants. It was not until August 4, 1977 that the intermediary requested a formal opinion from superiors and learned that CETA funds were to be offset against costs. Plaintiff was advised of this by letter dated October 7, 1977 and by personal instructions from Mr. Reeves on November 9, 1977.

Pursuant to the statutory procedure, the Secretary reopened plaintiff's cost reports for 1975, 1976 and 1977 to make adjustments for the CETA funds which should have been offset against costs. Notices of Program Reimbursements were sent to plaintiff. CHS than appealed this determination to the Provider Reimbursement Review Board (PRRB) and was provided with a trial-type hearing on January 22, 1980. The PRRB denied plaintiff's appeal on March 12, 1980 and this appeal followed.

Judicial review of the PRBB decision is limited to that set out in § 10(e) of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(E). 42 U.S.C. § 1395oo(f)(1). That section reads, in pertinent part:

> [t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability

> of the terms of an agency action. The review court shall — . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be — . . .
>
> (E) unsupported by substantial evidence in a case subject to review on the record of an agency hearing.

In making this determination, the court shall review the whole record, or those parts cited by the parties. Questions of fact are reviewed on the substantial evidence standard while, in deciding questions of law, the court must determine whether the correct legal standard was applied.

I. Did the PRRB Err As A Matter of Law In Holding That CETA Funds Do Not Qualify For The "Seed Money" Exception?

Plaintiff argues that the PRRB erred as a matter of law in concluding that the CETA funds which were used by CHS to pay its CETA employees were not "seed money" and therefore, should have been deducted from operating costs in computing reimbursable costs. We have carefully reviewed the decision of PRRB on this point and conclude that there was no error in excluding CETA funds from the "seed money" exception.

The plain language of the relevant statutes under the Act are clearly supportive of the PRRB's determination. At 42 C.F.R. § 405.423(a), the regulations provide that grants to providers shall, for the purposes of reimbursement, be treated as follows:

> Unrestricted grants, gifts and income from endowments should be deducted from operating costs in computing reimbursable cost. Grants, gifts, and endowment income designated by a donor for paying specific operating costs should be deducted from the particular operating cost or group of costs.

The term "restricted grant" is defined at 42 C.F.R. § 405.423(b)(2) as:

> . . . funds, cash or otherwise, which must be used only for the specific purpose designated by the donor. This does not refer to unrestricted grants, gifts, or income from endowments which have been restricted for a specific purpose by the provider.

The CETA funds at issue in this case cannot be characterized as "unrestricted funds." The agreement under which plaintiff receives the CETA funds specifically states that "Grantor agrees that for the duration of the term of this Agreement, Grantor will (b) Reimburse Grantee for actual costs incurred in Grantee's payment of compensation and fringe benefits to participants provided by Grantor.... (Tr. 424) Certain restricted grants, however, qualify for the "seed money" exception which is found in the Department's Provider Reimbursement Manual, HIM-15, Part I, § 612, entitled "Public Health Service Grants." A Public Health Service Grant is one which is authorized under the Public Health Service Act, 42 U.S.C. § 201 *et seq.* The exception for "seed money" is as follows:

> [G]rants designated for the development of new health care agencies or for expansion of services of established agencies are generally referred to as "seed money" grants. "Seed money" grants are not deducted from costs in computing allowable costs. These grants are usually made to cover specific operating costs or groups of costs for services for a stated period of time.

Our attention is particularly drawn to the words "designated for the development of new health care agencies." Clearly CETA funds were not specifically so designated and no tortured construction of the statute could bring the CETA grants within the "seed money" exception.

Plaintiff argues that the CETA funds were used to employ additional personnel at CHS and therefore resulted in an expansion of health care service at the institution. It contends, therefore, that since the net effect of the utilization of the CETA money was to benefit and expand a health care agency, the CETA funds should qualify under the "seed money" exception. The PRRB adequately addressed this argument and concluded that this is insufficient to bring CETA funds within the exception. (PRRB decision at 5) We therefore find that the PRRB did not err as a matter of law in reaching this determination.

II. Should The Government Be Estopped To Recoup These Overpayments?

Plaintiff argues that the government should be estopped from recovering the overpayment in this case since from

the spring of 1975 through August of 1977 it had been assured by a representative of the intermediary that CETA funds would not be offset for the purposes of Medicare reimbursement. Subsequently, on September 20, 1977, the Medicare Bureau informed the intermediary, who in turn informed CHS, that CETA funds are restricted grants and not within the "seed money" exception. Plaintiff alleges that it relied to its detriment on this advice and spent the money represented by the additional Medicare reimbursement on expanding its services. According to plaintiff, these facts establish detrimental reliance by the provider on misinformation given it by the intermediary.

It is now clearly established that estoppel may lie against the government in certain limited circumstances. *Brown* v. *Richardson*, 395 F. Supp. 185 (W.D. Pa. 1975). These circumstances were discussed thoroughly in *Brown* v. *Richardson* and the court held that the government could not be estopped to deny benefits as the result of a statement made in a Medicare handbook. In reaching this conclusion, the court cited the Supreme Court decision in *Utah Power and Light Co.* v. *United States*, 243 U.S. 389 (1917) which held that:

> [T]he United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. 395 F. Supp. at 189.

The court went on to note that:

> [B]y operation of law, parties dealing with the government are charged with knowledge of, and are bound by, statute and lawfully promulgated regulations, and reliance upon incorrect information received from government agent or employee cannot alter the terms of a statute regardless of the economic hardship which may result. *Id.* at 190.

In this case, the regulations dealing with Medicare reimbursement clearly provide that only those grants "designated" for the expansion of health care services would qualify under the "seed money" exception. The fact that Mr. Reeves erroneously advised CHS that CETA funds qualified

for the exception cannot alter the principles upon which the Medicare Act is based. Even if estoppel would properly lie in this case, the plaintiff's unjustified reliance upon the advice of the intermediary would preclude application of the doctrine. As stated in *Brown* v. *Richardson*, "an estoppel arises where one party by words or action makes a false representation of fact and the other party reasonably relies on that representation and is prejudiced thereby." *Id.* at 191. Elaborating on the reasonableness of reliance, the court stated:

> One who claims the benefits of an estoppel on the ground that he has been misled by the misrepresentations of another must not have been misled by his own lack of reasonable care and circumspection. A lack of diligence by a party claiming an estoppel is generally fatal. If the party conducts himself with careless indifference to the means of information reasonably at hand or ignores highly suspicious circumstance, he may not invoke the doctrine of estoppel.

The Medicare regulations allow the intermediary to reopen the cost reports up to three years after they have been approved. Thus, CHS relied at its own risk in accepting the intermediary's advice since plaintiff was on notice that all such reports were subject to review. Moreover, the fact that CHS was being reimbursed twice for the same expense should have been a red flag that its windfall was not supportable under the Act.

III. Is Defendants Attempt to Recoup The Overpayments Contrary to Law?

Plaintiff argues that if indeed it did receive an overpayment due to the treatment accorded to the CETA grants, defendants acted contrary to law by attempting to recoup those overpayments since it was without fault. This argument is premised on 42 U.S.C. § 1395gg and 42 C.F.R. § 405.355 which provide for waiver of adjustments in certain circumstances. Congress provided in the Act at 42 U.S.C. § 1395gg(b) and (c):

> (b) Where—
>
> (1) more than the correct amount is paid under this subchapter to a provider of services or other person

> for items or services furnished an individual and the Secretary determines...
>
> (B) that such provider of services or other person was without fault with respect to the payment of such excess over the correct amount...
>
> proper adjustments shall be made ... by decreasing subsequent payments—...
>
> (c) There shall be no adjustments as provided in subsection (b) of this section (nor shall there be recovery) in any case where the incorrect payment has been made ... with respect to an individual who is without fault or where the adjustment (or recovery) would be made by decreasing payments to which another person who is without fault is entitled as provided in subsection (b)(4), if such adjustment (or recovery) would defeat the purposes of title II or title XVIII or would be against equity and good conscience....

Defendants contend that this section of the Act does not apply in a case such as this, that there is no provision in the Act giving the Secretary authority to waive overpayments to the provider and therefore under 42 U.S.C. § 1395g the Secretary is obligated to recover the overpayments.

Based upon a fair reading of these statutory provisions and the detailed consideration given to them in *Mt. Sinai Hospital of Greater Miami, Inc.* v. *Weinberger*, 517 F.2d 329 (5th Cir.1975) *cert. denied*, 425 U.S. 935 (1976) (hereinafter *Mt. Sinai*), we are unwilling to determine that the Secretary acted contrary to law by seeking to recover the overpayments in this situation.

Section 1395gg deals with preconditions to recovery against individual beneficiaries and provides that in cases of overpayment in noncovered or excluded services where the recoupment could not be recovered from the provider or where the provider was without fault, the Department will not seek recovery from the provider but will determine whether recovery from the beneficiaries is permissible. This implied waiver only exists where, in the absence of recovery from the provider, the overpayment could, if not prohibited by other statutory provisions, be recouped from the beneficiary. This section authorizes the Secretary to recoup overpayments from beneficiary's old-age benefits, but

only where "the excess over the correct amount could not be recouped from the provider. *Mt. Sinai*, 517 F.2d at 336.

In *Mt. Sinai*, the provider contested the Secretary's attempt to recoup payment for medical services and supplies to beneficiaries which later turned out to be medically unnecessary. After an in-depth statutory analysis, the Fifth Circuit Court of Appeals distinguished overpayment arising from noncovered or excluded services from those arising from erroneous "reasonable cost" determinations and held that § 1395gg applied only to overpayments arising from noncovered or excluded services. *Id.* at 340-342. *Mt. Sinai* does suggest in a footnote that in cases of overpayment based on noncovered or excluded services, the lack of fault on the part of the provider would be a defense to recoupment, but does not deal with reasonable costs. *Id.* at 33.

While there is no explicit authority in the statute to waive recoupment from the provider, we find it difficult to believe that the Secretary is wholly without power to do so where it appears that individual recipients would suffer or the purpose of the Act would be frustrated. In addition, we note that in the PRRB Hearing Manual at § 52(g), the Board is denied jurisdiction over "the waiver of an overpayment to a provider or the manner of repayment." The clear implication of this section is that such waivers are permitted should the Secretary determine it appropriate. However the decision of the Secretary not to waive recovery in this case is a discretionary one, presumably based upon all the relevant facts and we are not able to find that his discretion was abused in this case.

IV. Is Plaintiff Entitled To A Pre-Recoupment Hearing?

Plaintiff argues that the denial of its waiver request without an agency hearing constitutes a violation of its right to due process under the Fifth Amendment of the United States Constitution. The PRRB did not address the waiver issue since it is without jurisdiction to do so under § 1150.52(g) of the PRRB Hearing Manual.

As we have just discussed, there is no specific statutory provision requiring waiver by the government in favor of the provider where there have been overpayments as to the

reasonable costs of services. Plaintiff does not base its assertion on any statutory right to waiver, but rather relies on a traditional due process argument that its statutory entitlement to reimbursement for the reasonable cost of services rendered to Medicare beneficiaries creates a property interest which is entitled to procedural due process protection before termination.

In the prior law suit before this court concerning the same overpayments, the Secretary agreed to cease recoupment of the overpayment and refund to plaintiff all monies already recouped. Recoupment was stayed pending resolution of the dispute, and consequently, no portion of the overpayment has been recovered by the Medicare program. In the interim, an indepth hearing was held before the PRRB to determine whether the CETA funds qualified as "seed money" and that the adjustments made were proper. Presently, this court is entertaining plaintiff's arguments on the merits of that decision and the constitutionality of the hearing. Now the plaintiff asks us to find that a pre-recoupment hearing on the question of waiver is constitutionally required. We have already considered the decision of the Secretary not to waive recoupment and have decided that she did not abuse her discretion in reaching this decision. All of this has been afforded plaintiff before any monies have actually been recouped. We therefore find no case or controversy which would enable us to reach the more general question of whether a pre-recoupment hearing on the issue of waiver should be required in all cases.

V. Is Traveler's Independently Liable to Plaintiff?

Plaintiff asserts that Travelers was acting ultra vires by deliberately and consciously misadvising CHS on the cost accounting treatment of CETA funds when it knew that no government policy had been set forth and knew that its advice could not substitute for that of the Secretary. Therefore, plaintiff believes that Travelers should be held independently liable to it for the overpayment.

It is well established that a mere mistake of judgment does not constitute activity outside a federal official's authority so as to make him or her personally liable for dam-

ages. *Butz* v. *Economu*, 438 U.S. 478 (1978). As an agent of the Secretary pursuant to § 1816 of the Act, 42 U.S.C. § 1395h, Travelers and its representatives enjoy the same immunity from damage suits as a federal official. *Matrana* v. *Travelers Insurance Company*, 563 F.2d 677 (5th Cir.1977).

The duties of the intermediary are outlined in the Act at 42 U.S.C. § 1395h(a) and in the agreement entered into between Travelers and CHS. Included among these duties are the responsibility for provide consultative services to the institutions, to serve as a channel of communication to the Secretary and to review and settle provider cost reports. Mistakes in the treatment of cost items were expected and provided for in the regulations. 42 U.S.C. § 405.1885(b) provides:

> (b). A determination or a hearing decision rendered by the intermediary shall be reopened and revised by the intermediary if, within the aforementioned 3-year period, the Health Care Financing Administration notifies the intermediary that such determination or decision is inconsistent with the applicable law, regulations, or general instructions issued by the Health Care Financing Administration in accordance with the Secretary's agreement with the intermediary.

In this case there is no question but that Michael Reeves gave incorrect advice to the provider and approved cost reports reflecting that erroneous advice. But there is no evidence of willful or wanton misconduct on the part of Mr. Reeves. It is inconceivable that the government could have an established policy for each and every possible grant received by a provider and it is expected that the intermediary will give its opinion on unexpected questions that arise. It is also expected that those opinions will not always coincide with the position of the Secretary. The regulations make it clear that it is the statutes themselves and the opinion of the Secretary which is controlling. It does appear that Mr. Reeves exercised poor judgment by waiting so long before checking with his superiors on the correct application of CETA funds. However, as earlier stated, mistakes of judgment do not constitute activity outside the fed-

eral official's authority. We find no basis for holding Travelers independently liable to plaintiffs.

VI. Did Defendant's Retroactively Apply a Policy Change Without Complying with the APA?

Plaintiff interpretes [sic] the Secretary's instructions to offset CETA grants against the reasonable costs reimbursed by Medicare as a change in policy requiring the procedure set out in the APA for rulemaking. Further, plaintiff argues that such a change in policy cannot be applied retroactively.

As has been stated earlier, the intermediary's oral advice that the provider's CETA grants constituted "seed money" cannot alter the controlling statutory law. The intermediary was mistaken in its interpretation of the law and its correction of this mistake after seeking and receiving guidance from the Secretary did not constitute a substantive change in the Secretary's policy. Since we have determined that there never was an official "policy" with respect to the treatment of CETA funds, there cannot have been a policy change.

VII. Did PRRB Improperly Exclude Evidence Offered By Plaintiff?

Plaintiff alleges that the PRRB abused its discretion by preventing it from introducing evidence showing discriminatory application of governmental policy by denying its request to subpoena or depose a particular witness and by precluding it from showing Travelers' arbitrary application of the policy with respect to CETA grants.

Under 5 U.S.C. § 556(c), employees presiding at agency hearings are to issue subpoenas authorized by law, rule on offers of proof and receive relevant evidence, have depositions taken when the ends of justice would be served, and regulate the course of the hearing. Further in 5 U.S.C. § 556(d), the agency is authorized to provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence. The record indicates that after an offer of proof and extensive argument, the chairman of the PRRB ruled that the testimony of the witness who refused to appear voluntarily, was not "germane to the basic question in this case

as to whether or not this Provider was treated in accordance with the regulations and fairly and given due process and so it will not be accepted." (Tr., 160).

The hearing examiner has wide latitude as to all phases of conduct of the administrative hearing. *Cella* v. *United States*, 208 F.2d 783 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016, and the definition of the scope of the proceeding raises questions which particularly call for agency judgment. *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327 (1945). We have reviewed the colloquy leading up to the evidentiary ruling and studied the issues before the Board, and cannot see that the exclusion of this evidence was in any way an abuse of the PRRB's discretion.

For all the above reasons, we find the merits of this undisputed controversy to lie with the defendants and therefore grant their motion for summary judgment. Of necessity, plaintiff's motion must be denied. An appropriate order will be entered.

/s/ William W. Knox

U.S. District Judge

DECEMBER 29, 1980

cc: Counsel of record.

APPENDIX D

PROVIDER REIMBURSEMENT REVIEW BOARD HEARING DECISION

80-D12

Case No. 78-215

PROVIDER—COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC. MEADVILLE, PENNSYLVANIA
PROVIDER NO. 39-7041

v.

INTERMEDIARY—THE TRAVELERS INSURANCE COMPANY

Date of Hearing—January 22, 1980
Cost Reporting Period Ending—October 31, 1975, 1976 and 1977

ISSUE

Whether or not Comprehensive Employment and Training Act Funds (CETA) qualify as unrestricted funds pursuant to 42 CFR 405.423?

SUMMARY OF FACTS

Community Health Services of Crawford County, Inc., is a nonprofit home health agency. The agency performed 5,210, 7,757, and 8,246 home health visits for the cost reporting periods respectively ending October 31, 1975, 1976 and 1977. Cost reports for the aforementioned periods were filed with the Provider's fiscal intermediary, Travelers Insurance Company.

During the periods in question, the Provider included in its reimbursable cost the salaries and fringe benefits of CETA employees. Pursuant to the CETA participatory agreements, the Provider was reimbursed for the salary and fringe benefits of its CETA employees. Accordingly, the Provider received the following reimbursement for its CETA employees:

1975	$16,555
1975	$53,952
1977	$81,118

In filing its cost reports for the periods ending 1975 and 1976, the Provider included in allowable costs the salary and fringe benefits of CETA employees without a corresponding offset for the CETA funds received. The Intermediary accepted the Provider's treatment of the CETA funds received. Notices of Program Reimbursement were issued the Provider on April 19, 1976 and April 12, 1977, for the cost reporting periods respectively ending October 31, 1975 and 1976. Throughout these periods, it was the opinion of the Intermediary that CETA funds qualified as "seed money" pursuant to Section 612.2 of the Provider Reimbursement Manual (HIM-15-1). On August 4, 1977, the Intermediary sought advice from the Philadelphia Regional Office of the Health Care Financing Administration (HCFA) concerning the treatment of CETA funds. In response to this inquiry, the Regional Office advised Travelers on September 20, 1977, of the following:

> "Where the employer includes these persons on its payroll, the amounts reimbursed by CETA for wages and fringes should be offset against the cost." (Intermediary's Position Paper, Exhibit 5)

Travelers, therefore, notified the Provider on October 7, 1977, that where CETA participant's wages and fringes are included in the expenses of a provider, applicable CETA grants must be used to offset expenses for Medicare cost reimbursement purposes. Subsequently, the Provider filed its cost report for the period ending October 31, 1977, on February 2, 1978. Once again, the Provider did not give recognition to offsetting salaries and fringe benefits by CETA Funds. Hence acting on the advice of HCFA's Regional Office, Travelers revised the Provider's 1975 and 1976 settlements to recognize such an offset. Revised Notices of Program Reimbursement were mailed to the Provider on May 24, 1978 and June 5, 1978, for the cost years respectively ending October 31, 1975 and 1976. Likewise, as a result of a desk review of the Provider's 1977 cost report, a similar offset was made for CETA funds. A Notice of Program Reimbursement for 1977 was mailed to the Provider on June 26, 1978. The Provider takes exceptions to

these adjustments and has filed a timely appeal before the Provider Reimbursement Review Board.

The Provider submits that the offsetting of CETA funds against salaries and fringe benefits is improper. The Provider contends that CETA funds qualify as "seed money" pursuant to Section 612.2, HIM-15-1. In the instant case, the Provider alleges that the receipt of CETA funds enabled it to expand its scope of services.

> "*Seed-Money Grants.*—Grants designated for the development of new health care agencies or for the expansion of services of established agencies are generally referred to as 'seed money' grants. 'Seed money' grants are not deducted from costs in computing allowable costs." (Section 612.2, HIM-15-1)

The CETA funds, argues the Provider, are to supplement its funds not supplant its funds.

> "CETA funds will, to the extent practicable, be used to supplement, rather than supplant the level of funds that would otherwise be available for the planning and administration of programs under the eligible applicant's grants [Section 703(ii)]." (Assurances and Certification attachment to Memorandum of Agreement, Provider's Position Paper, Exhibit J)

The Assurances and Certifications of the CETA Grant further provide:

> "Jobs are in addition to those that would be funded by the sponsor in the absence of assistance under the Act Section 205(c)(24)."

Accordingly, the Provider asserts that CETA grants should be accorded the treatment of "seed money."

Further, the Provider argues that the Intermediary is estopped from raising the issue of offset. The estoppal argument is predicated on the fact that the Intermediary for nearly two years advised the Provider that salaries and fringe benefits need not be offset by CETA funds.

To the contrary, the Intermediary asserts that CETA funds do not qualify as "seed money." The Congressional intent of CETA funding is to provide jobs or training for the unemployed. Congress did not view CETA funding as a mechanism to expand health care services. Further, the In-

termediary argues that pursuant to 42 CFR 405.1885(b), it is required to revise a provider's settlement where an earlier determination is contrary to applicable general instructions. Hence the Intermediary is not estopped from revising prior cost settlements.

CITATION OF APPLICABLE LAW, REGULATIONS, AND PROGRAM INSTRUCTIONS

A. Regulations—42 CFR 405, Regulations No. 5, Subpart D

Section 405.423 Grants, gifts, and income from endowments

B. Program Instructions—Provider Reimbursement Manual, Part 1 (HIM-15-1)

Section 612.2 Seed-Money Grants

CONCLUSIONS AND FINDINGS

The Provider Reimbursement Review Board, after consideration of the facts, the parties' contentions, and evidence presented concludes and finds that salaries and fringe benefits paid to CETA employees must be offset by the receipt of CETA funds for the period ending October 31, 1977.

The Regulations at 42 CFR 405.423 very implicitly state that donor-restricted funds which are designated for paying certain hospital operating expenses should apply and serve to reduce these costs or group of costs. In the instant case, the CETA grant was restricted to specifically pay the salaries and fringe benefits of the CETA employees of the Provider.

> "5. Grantor agrees that for the duration of the term of this Agreement, Grantor will:
>
> . . .
>
> b) Reimburse Grantee for actual costs incurred in Grantee's payment of compensation and fringe benefits to participants provided by Grantor . . ."
>
> (Memorandum of Agreement, Intermediary Position Paper, Exhibit 1)

Further, the Board finds the purpose of "seed money" as defined by Section 612.2, HIM-15-1 and a CETA grant is

clearly distinguishable. "Seed money" as defined by the Manual is a grant designated for the development of new health care agencies or for the expansion of services of established agencies. The purpose of the Comprehensive Employment and Training Act of 1973 is "to provide job training and employment opportunities for economically disadvantaged, unemployed, and under employed persons, and to assure that training and other services lead to maximum employment opportunities." (29 USC 801—Congressional statement of purposes) Although the residual effect of CETA funding in the instant case may have contributed toward an expansion of services, the purpose of CETA funding is clearly to assure opportunities for employment and training to unemployed and under employed persons. (House Report No. 93-659) The Board finds that greater weight must be accorded the purpose of a donor restricted grant rather than an alleged residual effect in determining whether a grant qualifies as "seed money."

Further, the Board finds that the adjustments proposed to the 1975 and 1976 cost reports are improper. Pursuant to 42 CFR 405.1885, a determination of an intermediary may be reopened within three years of the date of a Notice of Program Reimbursement. The Regulations continue to state:

> "Section 405.1887 Notice of Reopening
>
> (a) All parties to any reopening described above shall be given written notice of the reopening. When such reopening results in any revision in the prior decision, notice of said revision or revisions will be mailed to the parties with a complete explanation of the basis for the revision or revisions . . ."

These principles are also reiterated in Part A Intermediary Manual, Part 2, Audits Reimbursement Program Administration (HIM-13-2). Section 2632, HIM-13-2, directs the intermediary to give written notice to the provider of a reopening. In reviewing the record for the cost reporting periods ending October 31, 1975 and 1976, no such notice was given the Provider. In addition, the Board finds that the Intermediary is barred by statute from giving notice of a reopening for the 1975 cost reporting period. However, the defect for the 1976 cost reporting period may be corrected. The statute of limitation for the latter year extends

to April 14, 1980. Should the Intermediary render a timely notice of reopening to the Provider for the cost reporting period ending October 31, 1976, the decision of this Board for the cost reporting period ending October 31, 1977, will be equally applicable to the 1976 cost reporting period.

Finally, the Board would like to acknowledge the Provider's argument concerning the role of the fiscal intermediary. The Regulations succinctly state that "an important role of the fiscal intermediary, in addition to claims processing and payment and other assigned responsibilities, is to furnish consultative services to providers in the development of accounting and cost-finding procedures which will assure equitable payment under the program" [42 CFR 405.401(e)]. However, it should be emphasized that the role of the intermediary is not to establish the principles of reimbursement. This is the responsibility of the Secretary. Although the Provider acted in good faith in not offsetting salaries and fringe benefits by CETA funds, advice by the Intermediary cannot be a substitute for the opinion of the Secretary.

DECISION

The Intermediary is sustained for the cost reporting period ending October 31, 1977. CETA funds are not to be treated as "seed money." The adjustments of the Intermediary are reversed for the periods ending October 31, 1975 and October 31, 1976, inasmuch as proper notices of reopening were not sent to the Provider.

In the event that the Intermediary renders a timely notice of reopening to the Provider for the cost reporting period ending October 31, 1976, the decision of this Board for the cost reporting period ending October 31, 1977, will be equally applicable to the 1976 cost reporting period.

Board Members Participating

Thomas M. Tierney
Carolyn B. Lewis
H. Joseph Curl

FOR THE BOARD

/s/ Thomas M. Tierney

THOMAS M. TIERNEY
Chairman

March 12, 1980

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5098

COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., a non-profit corporation, ADA WERNER, an individual, FRANK E. WERNER, an individual, and SHIRLEY SORGER, an individual

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, AND THE TRAVELERS INSURANCE COMPANIES, a corporation

(D.C. Civil No. 78-74 Erie)

COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., a non-profit corporation

v.

PATRICIA ROBERTS HARRIS, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, AND THE TRAVELERS INSURANCE COMPANIES, a corporation

(D.C. Civil No. 80-056B Erie)

COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., ET AL., APPELLANTS

(D.C. Civil Nos. 78-0074 & 80-056B Erie)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA—ERIE

Present: Aldisert, Higginbotham, *Circuit Judges;* Meanor, *District Judge* *

---

*Honorable H. Curtis Meanor, United States District Court for the District of New Jersey, sitting by designation.

JUDGMENT

This cause came on to heard on the record from the United States District Court for the Western District of Pennsylvania—Erie and was argued by counsel September 29, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court entered November 16, 1981, be, and the same is hereby reversed and the cause remanded to the said District Court which is directed to grant appellants' petition to estop the Secretary from recouping the alleged overpayment. Costs taxed against appellee.

ATTEST:
/s/ Sally Mrvos
Clerk

JANUARY 19, 1983

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-56

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION TO DISPENSE WITH THE REQUIREMENT OF A JOINT APPENDIX

Pursuant to Rule 30.7 of the Rules of this Court, the Solicitor General, on behalf of the Secretary of Health and Human Services, seeks leave to dispense with the requirement of a joint appendix in this case.

The question presented by this case is whether the Secretary of Health and Human Services may be estopped from recovering excess payments made to a provider of health care services under the Medicare program on the ground that a fiscal intermediary previously had advised the provider that the payments were allowable. The facts in the case, which are largely undisputed, are set out in considerable detail in the opinions of the Provider Reimbursement Review Board, the district court, and the court of appeals. These opinions are printed in the appendix to the petition for a writ of certiorari. In these circumstances, there is no justification for printing of a joint appendix.

Counsel for respondents have authorized me to state that they join in this request.

Respectfully submitted.

REX E. LEE
Solicitor General

OCTOBER 1983

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No. 83-56

In the Supreme Court of the United States

October Term, 1983

MARGARET M. HECKLER,
Secretary of Health and Human Services,

Petitioner,

v.

COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., a non-profit corporation, ADA WERNER, an individual, FRANK E. WERNER, an individual and SHIRLEY SORGER, an individual,

Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Counsel for Respondents

QUESTION PRESENTED

Whether the Secretary of Health and Human Services may be estopped when her agent repeatedly and knowingly violates his statutory duty to communicate questions raised by a provider for which the Secretary has provided no guidance to the proper authority within the Department of Health and Human Services choosing instead to communicate his own policy decision upon which the provider relies to its detriment?

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the Travelers Insurance Companies was an appellee in the court of appeals.

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No. 83-56

In the Supreme Court of the United States

October Term, 1983

MARGARET M. HECKLER,
Secretary of Health and Human Services,

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v.

COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., a non-profit corporation, ADA WERNER, an individual, FRANK E. WERNER, an individual and SHIRLEY SORGER, an individual,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Third Circuit's decision in this case. That decision is recorded at 698 F.2d 615 and Appendix A, pages 1a-33a of the petition.

STATUTE, REGULATION AND CONTRACT INVOLVED

At times relevant to this dispute, § 1816(a) of the Social Security Act, 42 U.S.C. § 1395h(a), provided:

> If any group or association of providers of services wishes to have payments under this part to such providers made through a national, State, or other public or private agency or organization and nominates such agency or organization for this purpose, the Secretary is authorized to enter into an agreement with such agency or organization providing for the determination by such agency or organization (subject to the provisions of § 1395(oo) of this title and to such review by the Secretary as may be provided for by the agreement) of the amount of the payments required pursuant to this part to be made to such providers, and for the making of such payments by such agency or organization to such providers. Such agreement may also include provision for the agency or organization to do all or any part of the following:
>
> > (1) to provide consultative services to institutions or agencies to enable them to establish and maintain fiscal records necessary for purposes of this part and otherwise to qualify as hospitals, extended care facilities, or home health agencies, and
> >
> > (2) with respect to the providers of services which are to receive payments through it
> >
> > > (a) to serve as a center for, and communicate to providers, any information or instructions furnished to it by the Secretary, and serve as a channel of communication from providers to the Secretary;
> > >
> > > (b) to make such audits of the records of providers as may be necessary to ensure that proper payments are made under this part; and

(c) to perform such other functions as are necessary to carry out this subsection.

Section 1817 of the Social Security Act, 42 U.S.C. § 1395i, provides in pertinent part for the establishment of a Trust Fund:

(a) There is hereby created on the books of the Treasury of the United States a trust fund to be known as the "Federal Hospital Insurance Trust Fund" (hereinafter in this section referred to as the "Trust Fund"). The Trust Fund shall consist of such gifts and bequests as may be made as provided in § 401(i)(1) of this title, and such amounts as may be deposited in, or appropriated to, such fund as provided in this part. There are hereby appropriated to the Trust Fund for the fiscal year ending June 30, 1966, and for each fiscal thereafter, of any monies in the Treasury not otherwise appropriated, amounts equivalent to 100% of

(1) the taxes imposed by §§ 3101(b) and 3111(b) of Title 26 with respect to wages reported to the Secretary of the Treasury or his delegate pursuant to subtitle F of such Title 26 after December 31, 1965, as determined by the Secretary of the Treasury by applying the applicable rates of tax under such sections to such wages, which wages shall be certified by the Secretary of Health, Education and Welfare on the basis of records of wages established and maintained by the Secretary of Health, Education and Welfare in accordance with such reports; and

(2) the taxes imposed by § 1401(b) of Title 26 with respect to self-employment income reported to the Secretary of the Treasury or his delegate on tax returns under Subtitle F of such Title 26, as determined by the Secretary of the Treasury by applying the applicable rate of tax under such section to such

> self-employment income, which self-employment income shall be certified by the Secretary of Health, Education and Welfare on the basis of records of self-employment established and maintained by the Secretary of Health, Education and Welfare in accordance with such returns.

The amounts appropriated by the preceding sentence shall be transferred from time to time from the general fund in the Treasury to the Trust Fund, such amounts to be determined on the basis of estimates by the Secretary of the Treasury of the taxes, specified in the preceding sentence, paid to or deposited into the Treasury; and proper adjustments shall be made in amounts subsequently transferred to the extent prior estimates were in excess of or were less than the taxes specified in such sentence.

* * *

> (h) The Managing Trustee shall also pay from time to time from the Trust Fund such amounts as the Secretary of Health, Education and Welfare certifies are necessary to make the payments provided for by this part, and the payments with respect to administrative expenses in accordance with § 401(g)(1) of this Title.

42 C.F.R. 405.1803 provides in part:

> (a) Upon receipt of a provider's cost report, or amended cost report where permitted or required, the Intermediary shall, within a reasonable period of time (see § 405.1835(b)), analyze the report, undertake any necessary audit of the report, and furnish the provider and other parties appropriate (see § 405.1805) a written notice reflecting the Intermediary's determination of the amount of program reimbursement. The notice shall:
>
> > (1) explain the Intermediary's determination of total program reimbursement due the provider for

the reporting period covered by the cost report or amended cost report;

(2) relate this determination to the provider's claimed total program reimbursement due the provider for this period;

(3) explain the amount(s) and the reason(s) why, by appropriate reference to law, regulations, or program policy and procedures this determination may differ from the provider's claim; and

(4) inform the provider of its right to an Intermediary or Board Hearing, as appropriate (see §§ 405.1809, 405.1811, 405.1815 and 405.1835-405.1843) and that such Hearing must be requested within 180 days after the date of the notice.

The contract between the Secretary and the Intermediary (Travelers), referenced in § 1816 of the Social Security Act, 42 U.S.C. § 1395h(a), provides in pertinent part:

ARTICLE II

FUNCTIONS AND DUTIES TO BE PERFORMED BY INTERMEDIARY

The Intermediary shall:

A. Make determinations as to the coverage of services, of the amounts of payments and make payments to providers of services and eligible individuals in accordance with provisions of the Act, Regulations, and General Instructions.

B. Receive, disburse, and account for funds in making such payments.

C. Make audits of the records of providers of services as provided in Article IX.

D. Assist providers of services in the development of procedures relating to utilization practices and make studies of the effectiveness of such procedures, including the

appraisal and evaluation of the results of provider utilization review activity and recommendations for necessary changes in provider utilization practices and procedures; and assist in the application of safeguards against unnecessary utilization services.

E. Serve as a center for, and communicate to providers of services, any information or instructions furnished to it by the Secretary and serve as a channel of communication from providers of services to the Secretary.

F. Assist any institution, facility or agency to qualify as a provider of services and to furnish consultative services to such provider to enable it to establish and maintain fiscal records for purposes of Title XVIII of the Act. Consultative services by the Intermediary or any parent, affiliated or subsidiary organization, for providers of services, shall not include, (1) the preparation or completion of preliminary or initial cost reports, or (2) a compilation and maintenance of statistical or financial data and records.

G. As the Secretary may approve a request, make such Medicare management studies as may be necessary to insure the effective performance of this agreement.

H. Participate in or perform statistical and research studies as the Secretary may request or approve.

I. Establish and maintain such procedures as the Secretary may approve for considering and resolving any differences which may result when disputes arise from provider dissatisfaction with determinations of provider cost reports.

J. Establish and maintain such procedures as the Secretary may approve for the review and reconsideration of determinations under which payment to an eligible individual or provider of services on behalf of an individual for services furnished him has been denied or the amount of such payment is in controversy.

K. Upon inquiry, assist individuals with respect to matters pertaining to this agreement.

L. Perform such duties as may be necessary to carry out the provisions of this agreement and such other duties as may be agreed upon by the Secretary and the Intermediary.

* * *

ARTICLE XI

INDEMNIFICATION

In the event the Intermediary or any of its directors, officers or employees, or other persons who are engaged or retained by the Intermediary to participate directly in the claims administration process are made parties to any judicial or administrative proceeding arising, in whole or in part, out of any function or duty of the Intermediary under this agreement in connection with any claim for benefits by any individual, or his assignee, or provider of services, then the Secretary shall hold the Intermediary harmless for all judgments, settlements, and costs, in favor of such individual, or his assignee, or providers of services, incurred by the Intermediary or any of its directors, officers or employees, or other persons engaged or retained by the Intermediary to participate directly in the claims administration process, in connection therewith. The Intermediary shall reimburse the United States for the amount of any valid judgment or award paid by the United States in the discharge of the Secretary's obligations under this Article if the liability underlying the judgment or award was the direct consequence of conduct on the part of the Intermediary, determined by judicial proceedings or the agency making the award to be criminal in nature, fraudulent or grossly negligent.

STATEMENT OF THE CASE

A. Procedural Background

Respondents commenced this action to prevent petitioner through her agent, Intermediary Travelers Insurance Companies ("Travelers"), from withholding future Medicare reimbursement payments owed to respondent Community Health Services of Crawford County, Inc. ("CHS"), a non-profit home health care agency, because Travelers alleged that CHS had been overpaid for Medicare services rendered during its cost years 1975, 1976 and 1977. Prior to bringing this action, CHS requested that petitioner waive any recoupment of the alleged overpayments because CHS was without fault and, when that was denied, CHS requested an administrative hearing before the Provider Reimbursement Review Board ("PRRB"). Because of the continuing threat to withhold funds, respondents sought a Temporary Restraining Order which was granted by the District Court. Thereafter, agreement was reached with petitioner to hold in abeyance any recoupment activity pending final resolution of the dispute. A stipulation for a stay in the District Court action was entered to permit CHS to proceed with its hearing before the PRRB.

The hearing before the PRRB was limited because of the jurisdiction of the PRRB. See 42 C.F.R. § 405.1873 and 42 C.F.R. § 405.1869. The Board had no authority to consider the estoppel question. That issue along with several other issues not within the PRRB's jurisdiction and therefore not considered by the PRRB was preserved and raised *de novo* in CHS's appeal to the United States District Court for the Western District of Pennsylvania.

In the District Court, petitioner and CHS filed cross motions for summary judgment. The District Court denied CHS's motion and granted petitioner's. See District Court decision, Appendix C, pages 36a-48a of petition.

Respondents appealed from the District Court decision raising the following questions:

1. Whether the District Court erred in finding that the United States is not estopped from recouping alleged overpayments to Community Health Services of Crawford County, Inc. ("CHS"), a provider of services under the Medicare Act, where CHS, after inquiry made to Travelers Insurance Companies ("Travelers") as Intermediary for the United States, was repeatedly advised over a period of years that certain costs need not be offset by Comprehensive Employment and Training Act ("CETA") income in calculating cost reimbursement payments and CHS relied upon that advice, incurred the costs and expended income to expand non-profit medical services to the community?

2. Whether the District Court erred in finding that Travelers, as Intermediary for the United States, did not act outside the scope of its authority in advising CHS and inducing CHS' reliance and, therefore, never decided whether Travelers should be held liable to CHS and or the United States for payments to CHS which Travelers approved?

3. Whether the District Court erred in finding that there never was an official "policy" with respect to the cost accounting treatment of CETA grants so that there could not have been a policy change and therefore no violation of the Administrative Procedure Act?

4. Whether the District Court erred by finding that the PRRB did not abuse its discretion when it prevented CHS from introducing evidence that the United States, through Travelers, applied its policy of requiring CETA grants to be offset in a discriminating manner thereby denying CHS equal protection under the law?

5. Whether the decision by the Provider Reimbursement Review Board ("PRRB") and the affirmation of that decision by the District Court unfairly shift the cost of

delivery services to individuals not so covered in violation of the Medicare Act?

6. Whether, after deciding waiver was permitted, the District Court erred in concluding that the Secretary did not abuse his discretion in deciding not to waive recovery even though the Secretary has claimed throughout this action that he lacked authority to waive recovery?

7. Whether the District Court erred in concluding that the Provider Reimbursement Review Board ("PRRB") did not error in holding that CETA grants did not qualify as seed money grants?

8. Whether the District Court deprived the individual plaintiffs in Civil Action No. 78-74B of their property, interest and right to services under Medicare without the opportunity to be heard and the due process of law by applying the December 29, 1980 Memorandum Opinion and Order to Civil Action No. 78-74B?

Brief for Appellants in the United States Court of Appeals for the Third Circuit No. 82-5098.

The Third Circuit analyzed the factual information presented to it and concluded:

> We hold that the District Court erred in concluding that equitable estoppel does not lie against the Secretary of Health and Human Services on the facts of this case. We therefore will reverse the judgment of the District Court which granted appellee's motion for a summary judgment and remand these proceedings to the District Court with the direction that it grant appellants' petition to estop the Secretary from recouping the alleged overpayment.

698 F.2d at 628; Appendix A, page 23a of petition.

Because of its decision on the estoppel issue, the Third Circuit did not reach any of the other issues presented by respondents in their appeal. Petitioner filed a petition with the

Third Circuit for a rehearing, but that petition was denied. See Appendix B, pp. 34a-35a of petition. Thus, the only issue subject to this Court's consideration is the estoppel issue.

Subsequent to the issuance of the mandate by the Third Circuit, CHS applied for and was awarded attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), for those costs and fees not previously reimbursed under the Medicare cost accounting procedures and court procedures for taxing costs. See Order and Opinion dated June 7, 1983, Appendix A hereto, pages 1a through 4a. Petitioner filed her Notice of Appeal to the June 7, 1983 order on August 3, 1983.

B. Facts Material To The Consideration Of The Question Presented

The transactions between CHS and Travelers which gave rise to this controversy are not in dispute. Travelers' Medicare manager, Michael Reeves, and CHS's administrator, John Wallach, both testified at the PRRB Hearing and there was no disagreement between them as to what occurred. CHS's Wallach testified that he asked Reeves on at least five occasions how CHS was supposed to treat the CETA grants for cost accounting purposes. Travelers' Reeves advised Wallach that the CETA grants did not have to be offset against CHS's reimbursable costs because they qualified as "seed money." Travelers then approved CHS's cost reports which CHS prepared as directed by Reeves. The Secretary's regulations required Travelers to provide CHS with written notice reflecting Travelers' determination of the amount of program reimbursement and Reeves testified that that was done. 42 C.F.R. § 405.1803. Thus, Travelers was obligated to provide written advice to CHS for the Cost Years in question and, pursuant to those procedures, approved CHS' cost reports prepared according to the "Reeves" procedure.

Travelers first advised CHS in October 1977, the last month of CHS's 1977 Cost Year, that there was a problem with

the cost accounting procedure directed by Reeves. This was approximately two and one-half years after Wallach's first inquiry and Reeves' first guidance and after CHS had used the "extra" funds to expand the services that it provided to the residents of Crawford County. The "extra" funds were used as start-up funds for various governmental approved programs until the programs became self-sustaining through the Medicare cost reimbursement procedures. The CETA grant funds were the only means for CHS, a non-profit agency, to accomplish this expansion. These services that CHS provided by using the CETA grants were especially critical because the Secretary had designated the geographical area served by CHS as medically underserved under Section 332 of the Public Health Service Act. 42 U.S.C. § 254e. Section 332 provides generally for increased government assistance in terms of money and or Public Health Service employees to ease the medical shortages.

The Secretary does not dispute that these "extra" funds were used to benefit the citizens of Crawford County. This is further acknowledged by the Third Circuit.

> The Court wishes to emphasize the injustice to CHS and the people it serves if it is required to refund the alleged overpayments. The extra monies were used to expand CHS' services to meet serious human needs. This case, therefore, is distinguishable from others that involve possible overtones of fraud or profiteering by submitting to Medicare inflated cost reports for unnecessary services. No one questions the reasonableness of the amounts paid to, or the necessity of employing CETA workers. The only people who profited were the weak, the lame and the ill who comprised CHS' impoverished and medically underserved beneficiaries. They would be the persons injured if CHS were required to repay the funds in question. In granting CHS' motion for a Temporary Restraining Order, the District Court recognized this harm when it asserted that recoupment of the CETA funds "will likely

> cause CHS to cease or severely curtail operations as a home health service agency, thereby threatening the health and lives of the individual plaintiffs and others similarly situated." This Court, like the Second Circuit, refuses to sanction such a manifest injustice occasioned by the Government's own misconduct.

698 F.2d at 627; Appendix A, p. 21a of petition.

Reeves testified at the PRRB Hearing that he knew of no official policy concerning the CETA grants at the time he was asked by CHS for guidance. Even in hindsight, Reeves was unable to identify any policy during this time period. There is no other testimony concerning petitioner's alleged policy. Reeves further testified that the procedure, which Intermediaries were to follow to obtain answers to questions for which there was no guidance, was to pass the questions along to the regional office of the Bureau of Health (an agency of the Secretary). Reeves did not pass along CHS' repeated inquiries for over two years yet advised CHS during this time not to offset the CETA grants.

After hearing and analyzing the testimony, the PRRB made factual findings as follows:

> [T]he Board would like to acknowledge the Provider's [CHS] argument concerning the role of the fiscal Intermediary [Travelers]. The Regulations succinctly state that "an important role of the fiscal Intermediary, in addition to claims processing and payment and other assigned responsibilities, is to furnish consultative services to providers in the development of accounting and cost-finding procedures which will assure equitable payment under the program" [42 C.F.R. 405.401(e)]. However, it should be emphasized that the role of the Intermediary is not to establish the principles of reimbursement. This is the responsibility of the Secretary. Although the Provider acted in good faith in not offsetting salaries and fringe benefits by CETA funds, advice by the Intermediary cannot be a substitute for the Opinion of the Secretary.

Petition, p. 54a.

Finally, recoupment of the alleged overpayments would likely cause CHS to close its doors. The District Court recognized this possibility early in the case when it issued a Temporary Restraining Order, a portion of which is cited by the Third Circuit at 698 F.2d at 626; Appendix A, page 19a of the petition. The reason for this problem is that the Secretary's regulations do not appear to distinguish between not-for-profit agencies and for-profit agencies when recoupment is indicated. Not-for-profit agencies are prohibited from generating income out of which recoupment could occur. Cash flow is critical to CHS' existence.

SUMMARY OF THE ARGUMENT

The facts underlying the proceedings are not in dispute. Petitioner merely disagrees with the Third Circuit's application of the law to the facts and offers no speical and important reasons for this Court's review. CETA has been repealed and petitioner makes no effort to show the prospective value of any decision which would be rendered by this Court. Factually, CHS inquired and was advised on at least five occasions over a period in excess of two years not to offset CETA funds against its costs. Relying on petitioner's agent, CHS used the "extra" funds to start-up new programs which subsequently became self-sustaining under the Medicare program. Only innocent people will be hurt if the Third Circuit is reversed.

ARGUMENT: REASONS FOR DENYING THE PETITION

A. The Facts Are Peculiar To This Case And Do Not Present This Court With The Opportunity To Settle Principles Of Importance To The Public.

Rule 17 of the Supreme Court Rules states that review "will be granted only when there are special and important

reasons therefor." This is the cornerstone of a petition for certiorari in a federal case. The Secretary's petition does not demonstrate reasons that are either special or important.

Petitioner's attempt to obtain this Court's review on writ of certiorari focuses on one principal argument: that the factual circumstances of this case do not justify the Third Circuit's decision estopping petitioner from recouping the alleged overpayments. This issue will be addressed in Section B.

Petitioner's focus on the factual circumstances is an apparent attempt to divert attention from her inability to justify the petition under Rule 17 of the Supreme Court Rules. Petitioner merely states that the estoppel issue is important but fails to support that statement with other than a conclusionary, general argument.

In *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955), the court reasoned:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal.

349 U.S. at 79 (quoting from *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923)). Petitioner makes no such showing.

In the Eighteenth Annual Benjamin N. Cardoza Lecture delivered before the Association of the Bar of the City of New York on October 28, 1958, Justice Harlan identifies three basic propositions to be considered by the Court when reviewing petitions for writ of certiorari in a federal case. First, Justice Harlan identifies the cornerstone as a "showing that the question sought to be reviewed is one of *general* importance." (Emphasis in the original.) Harlan, *Manning the Dikes*, 13

Record N.Y.C.B.A. 541, 551 (1958). An issue deemed important for review implies that the matter is of public interest and not merely a case of importance to the litigants.

The second basic proposition identified by Justice Harlan for a federal case requires a conflict of decisions between courts of appeal. Even here, Justice Harlan cautions that "differences between the courts of appeals in two or more circuits will not be accepted as a conflict if they can fairly be accounted for on the basis of variations in the factual situations among the cases involved." Harlan, *supra* at 552.

The third and final proposition sets forth a special and important reason test for non-conflict cases. Under non-conflict circumstances, the decision on whether to accept the petition should be a flexible one in order to accommodate changing circumstances. The focus of the review should be "the effect of the decision upon the 'exposition and enforcement' of the law, rather than its impact upon the parties in a particular case, that lies at the heart of the matter." Harlan, *supra* at 553. Examples of cases which are within the arguable class for certiorari may be those which involve a substantial constitutional point, the construction of an important federal statute, cases which have been decided contrary to decisions of this Court or important questions of public law.

The Secretary's petition identifies no conflict between the circuit decisions nor can the Secretary argue that the Third Circuit's finding of affirmative misconduct is contrary to any decision of this Court. In fact, the Secretary identifies two decisions where this Court refused to determine whether the government could be estopped in a case involving affirmative misconduct. See footnote 6 of the petition at page 12; *INS v. Miranda*, ___ U.S. ___, 74 L.Ed.2d 12 (1982); *Schweiker v. Hansen*, 450 U.S. 785 (1981). Other circuits have held that the government can be estopped. See, e.g., *Mendoza-Hernandez v. INS*, 664 F.2d 635 (7th Cir. 1981); *Corniel-Rodriquez v. INS*,

532 F.2d 301 (2d Cir. 1976); *Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1970); *Walsonavich v. United States*, 335 F.2d 96 (3d Cir. 1964).

Petitioner's sole attempt to bring this case within the debatable class for certiorari is her very general argument that this decision will have an adverse impact on federal funding programs in general where funds are paid out prior to any detailed audit. The argument appears to be that this case as it now stands will somehow prevent the federal government from recovering overpayments or would require the expenditure of substantial federal funds to do so. Petitioner fails, however, to identify any federal programs other than those created by the Social Security Act or to identify the impact. The only other argument raised by petitioner is that the Third Circuit's decision permits a court authorized raid on the public treasury. This is certainly not the case as the money to support the Medicare program is paid by a Trust Fund which receives its funding from employee and employer contributions and is subject to statutory trust arrangements. See Section 1817 of the Social Security Act, 42 U.S.C. § 1395i.

This case is simply one where the factual occurrences were so egregious that the Third Circuit found that an innocent third party, CHS, should not be held accountable for Travelers' errors. Moreover, the statutory provision which gives petitioner the authority to contract services with an intermediary such as Travelers, 42 U.S.C. § 1395h(a), and the contract between petitioner and Travelers, pertinent parts of which are set forth in the statutes section herein, permit petitioner to seek reimbursement from Travelers under circumstances such as those involved in this case. Petitioner has apparently made no effort to seek reimbursement from Travelers. In fact, petitioner now appears to be caught in a conflict of interest because of her legal representation of Travelers throughout this litigation. Query, how can petitioner now take an adversarial position with Travelers and attempt to obtain payment from Travelers for its actions?

Finally, petitioner has made no showing that circumstances such as those involved in this case could or would occur in the future. This is particularly important because the Comprehensive Employment and Training Act ("CETA") was repealed by Public Law 97-300, Title I, § 184(a)(1), October 13, 1982, 96 Stat. 1357, 29 U.S.C.A. § 801 et seq. (Supp. Vol.). Thus, any decision which could occur in this case would have no value as a precedent, only by analogy.

This is not a case where the Court should exercise its discretion and grant the writ of certiorari because the facts are peculiar to this case and petitioner simply disagrees with the result.

B. The Finding Of Affirmative Misconduct Was Reasonable And, As A Result, The Petitioner Should Be Estopped

If, under some circumstances, the government can be estopped, then this case merely turns on factual issues and would provide no general guidance to subordinate courts at all.

1. The Government Can Be Estopped

Underlying all of the recent government estoppel cases decided by this Court is the concept that affirmative misconduct by the government may be sufficient to invoke the doctrine of equitable estoppel against the government.[1] These decisions imply that, presented with the proper case, this Court would find affirmative misconduct sufficient to estop the government. For example, in *INS v. Miranda, supra*, this Court approved the Court of Appeals' procedure:

> The Court of Appeals thus correctly considered whether, as an initial matter, there was a showing of affirmative misconduct.

[1] Recent cases are *INS v. Miranda*, ___ U.S. ___, 74 L.Ed.2d 12 (1982); *Schweiker v. Hansen*, 450 U.S. 785 (1981); *INS v. Hibi*, 414 U.S. 5 (1973); *Montana v. Kennedy*, 366 U.S. 308 (1961).

— U.S. —, 74 L.Ed.2d at 16. Even petitioner concedes that affirmative misconduct may be grounds for estopping the government. Petition at page 11.

Significantly, if affirmative misconduct is sufficient to estop the government, this case turns on purely factual considerations which would distinguish it from other cases. This is evident from the Third Circuit's opinion wherein that court factually distinguished the four recent cases and, additionally, distinguished *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380 (1947). The analysis by the Third Circuit is clear and will not be repeated herein.

A further distinguishing feature between this case and *Schweiker v. Hansen, supra*, is that CHS is not attempting to recover a social security benefit for which there is no longer eligibility. In this case it is the government that is attempting to recover an alleged overpayment but which, if recovered, would probably cause CHS to close its doors thereby depriving the individual respondents of property rights which they have accrued because of their payment into the Trust Fund. This deprivation is evident in the record because of petitioner's declaration that the geographical area served by CHS is medically underserved. Thus, it is likely that the individual respondents would be unable to obtain medical treatment under the Medicare Act. See Court of Appeals Appendix, pages 35a-68a. If CHS closed its doors, petitioner would then be obligated to provide medical personnnel and facilities to replace those provided by CHS. See Section 332 of the Public Health Service Act, 42 U.S.C. § 254e. Depletion of the public fisc by petitioner, not CHS, would then occur.

Finally, this case is not analogous to *Schweiker v. Hansen, supra*, because it is not a question of eligiblity. CHS was permitted under any construction of the law and regulations to use as a cost the salary and benefits provided to its employees whether they were regular or CETA employees. They were all

on the CHS payroll. The only procedure which petitioner can contend that CHS did not follow is that CHS did not offset the CETA money received against its costs. There is no substantive ineligibility to claim these costs. Only an accounting procedure is involved. Reeves testified that there was no guidance on the procedure and that in response to CHS' question he told CHS not to offset. To hold CHS responsible would be a travesty of justice.

2. There Was Affirmative Misconduct

Petitioner insists that she must comply with recoupment requirements of the statute and the regulations promulgated in support thereof, but where is petitioner's insistence that her agent, Travelers, must also comply with the statute and its contractual obligations to petitioner and to CHS as a third party beneficiary of that contract? Pursuant to § 1816(a) of the Social Security Act, 42 U.S.C. § 1395h(a), petitioner was authorized to enter into an agreement with an agent such as Travelers to provide payments to providers such as CHS. Additionally, petitioner was authorized to include provisions which would require Travelers to serve as a channel of communication from providers to petitioner.

Petitioner entered into such an agreement with Travelers. The agreement *required*, not permitted, Travelers to serve as a channel of communication. See the contract clause quoted in the statute section hereof. The testimony of Reeves reveals that he knew of the statutory contractual requirement to serve as a channel of communications but did not communicate CHS' question concerning cost accounting procedures until August of 1977, a period in excess of two years from CHS' first inquiry. The circumstances are clearly distinguishable from *Schweiker v. Hansen*, *supra*, because Reeves did not fulfill the duty to serve as a channel of communications contrary to law and to Travelers' contract with petitioner. CHS reasonably, and in good faith, relied on Reeves' advice. Subsequently, when the

procedure was changed (or created), CHS filed its lawsuit to prevent bankruptcy. Reeves knew what he was supposed to do, failed to do it, and then compounded the problem by giving the same advice to CHS for some two and a half years, advice that petitioner now contends was wrong. Clearly, Reeves' knowing violation of statutory and contractual provisions is affirmative misconduct. Petitioner should be estopped.

Throughout her petition, petitioner is rehashing the question of whether CETA grants qualify as seed money or not. CHS contends that this portion of petitioner's brief is not responsive because that question was not reached by the Third Circuit. The Third Circuit only decided the estoppel question.

Petitioner contends that the statute and the regulations require her to reopen any cost report found to be incorrect and that CHS was at least constructively aware of these requirements and thus CHS' reliance was not reasonable. The difficulty with this position is that petitioner must presuppose her lack of notice of the circumstances which caused the adjustment or, the question becomes why did the Secretary or her agent persist in giving erroneous advice. Such is not the case here. There is no dispute about CHS' notification of petitioner's agent prior to doing anything with its cost reports. The petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondents

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., a non-profit corporation, ADA WERNER, an individual, FRANK E. WERNER, an individual, and SHIRLEY SORGER, an individual vs. JOSEPH A. CALIFANO, JR., Secretary of the Department of Health, Education and Welfare, and THE TRAVELERS INSURANCE COMPANIES, a corporation	Civil Action No. 78-74 ERIE
COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., a non-profit corporation vs. PATRICIA ROBERTS HARRIS, Secretary of the Department of Health, Education and Welfare, and THE TRAVELERS INSURANCE COMPANIES, a corporation	Civil Action No. 80-56 ERIE

ORDER

AND NOW, this 7th day of June, 1983, the motion of the plaintiffs for attorneys' fees and expenses is GRANTED and plaintiffs are hereby AWARDED reasonable attorneys' fees and expenses in the sum of $17,920.53.

/s/ GERALD J. WEBER

Gerald J. Weber
United States District Judge

cc: ROSE, SCHMIDT, DIXON & HASLEY
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Pittsburgh, PA 15222
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IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., a non-profit corporation, ADA WERNER, an individual, FRANK E. WERNER, an individual, and SHIRLEY SORGER, an individual vs. JOSEPH A. CALIFANO, JR., Secretary of the Department of Health, Education and Welfare, and THE TRAVELERS INSURANCE COMPANIES, a corporation	Civil Action No. 78-74 ERIE
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OPINION

WEBER, D.J. June 7, 1983

The plaintiffs, who prevailed in this action before the Court of Appeals, seek attorneys' fees and expenses under the Equal Access to Justice Act. The government does not contest that plaintiffs were the prevailing parties, nor contest the reasonableness of the fees and expenses requested. Its sole base of

opposition is that its position was substantially justified within the terms of the statute. We believe that the burden of proving substantial justification rests on the government.

The government argues that substantial justification is founded on the fact that it prevailed before the Provider Reimbursement Reveiw Board and that it also prevailed before the District Court, and that one of the three members of the panel on the Court of Appeals dissented from the finding of the Court. It argues that the question of its being substantially justified is a question of reasonableness, and this "should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case." *Board Avenue Laundry and Tailoring v. United States*, 639 F.2d 1387, 1391 (Fed. Cir. 1982).

In this Circuit, the rule has been established that the "position" of the government includes the agency action which made it necessary for the party to file the suit, and is not limited to the government position in the litigation phase. *Natural Resources Defense Council v. United States Environmental Protection Agency*, 702 F.2d 700, (3d Cir. Mar. 23, 1983). It appears to us in the present case that the government is relying entirely on its litigating position in opposing the payment of attorneys' fees.

But the holding of the Court of Appeals in this case, by which the plaintiff finally prevailed, was that the government is estopped because of the affirmative misconduct of its agent (698 F.2d 615) seems to us to establish conclusively that the government's pre-litigation position was not substantially justified, and we so find.

No. 83-56

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the Secretary of Health and Human Services may be estopped from recovering excess payments made to a provider of health care services under the Medicare program on the ground that a fiscal intermediary previously had advised the provider that the payments were allowable.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Ada Werner, Frank E. Werner, and Shirley Sorger were appellants and the Travelers Insurance Companies was an appellee in the court of appeals.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-56

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 698 F.2d 615. The opinions of the district court (Pet. App. 36a-48a) and the Provider Reimbursement Review Board (Pet. App. 49a-54a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 55a-56a) was entered on January 19, 1983. A petition for rehearing was denied on February 14, 1983 (Pet. App. 34a-35a). By order dated May 6, 1983, Justice Brennan extended the time within which to

file a petition for a writ of certiorari to and including July 14, 1983. The petition was filed on that date and was granted on October 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

Section 1815(a) of the Social Security Act, 42 U.S.C. 1395g(a), provides:

> The Secretary shall periodically determine the amount which should be paid under this part to each provider of services with respect to the services furnished by it, and the provider of services shall be paid, at such time or times as the Secretary believes appropriate (but not less often than monthly) and prior to audit or settlement by the General Accounting Office, from the Federal Hospital Insurance Trust Fund, the amounts so determined, with necessary adjustments on account of previously made overpayments or underpayments; except that no such payments shall be made to any provider unless it has furnished such information as the Secretary may request in order to determine the amounts due such provider under this part for the period with respect to which the amounts are being paid or any prior period.

Section 1861(v)(1)(A) of the Social Security Act, 42 U.S.C. 1395x(v)(1)(A), provides in part that the Secretary's regulations governing the determination of the reasonable cost of services shall

> provide for the making of suitable retroactive corrective adjustments where, for a provider of services for any fiscal period, the aggregate reimbursement produced by the methods of de-

termining costs proves to be either inadequate or excessive.

42 C.F.R. 405.423 provides in part:

> (a) *Principle.* Unrestricted grants, gifts, and income from endowments should not be deducted from operating costs in computing reimbursable cost. Grants, gifts, or endowment income designated by a donor for paying specific operating costs should be deducted from the particular operating cost or group of costs.
>
> * * * * *
>
> (c) *Application.*
>
> * * * * *
>
> (2) Donor-restricted funds which are designated for paying certain hospital operating expenses should apply and serve to reduce these costs or group of costs and benefit all patients who use services covered by the donation. If such costs are not reduced, the provider would secure reimbursement for the same expense twice; it would be reimbursed through the donor-restricted contributions as well as from patients and third-party payers including the title XVIII health insurance program.
>
> * * * * *

42 C.F.R. 405.1885 provides in part:

> (a) A determination of an intermediary, a decision by a hearing officer or panel of hearing officers, a decision by the Board, or a decision of the Secretary may be reopened with respect to findings on matters at issue in such determination or decision, by such intermediary officer or panel of hearing officers, Board, or Secretary, as the case may be, either on motion of such intermediary officer or panel of hearing officers,

Board, or Secretary, or on the motion of the provider affected by such determination or decision to revise any matter in issue at any such proceedings. Any such request to reopen must be made within 3 years of the date of the notice of the intermediary or Board hearing decision, or where there has been no such decision, any such request to reopen must be made within 3 years of the date of notice of the intermediary determination. No such determination or decision may be reopened after such 3-year period except as provided in paragraphs (d) and (e) of this section.

(b) A determination or a hearing decision rendered by the intermediary shall be reopened and revised by the intermediary, if, within the aforementioned 3-year period, the Health Care Financing Administration notifies the intermediary that such determination or decision is inconsistent with the applicable law, regulations, or general instructions issued by the Health Care Financing Administration in accordance with the Secretary's agreement with the intermediary.

STATEMENT

1. Title XVIII of the Social Security Act, 42 U.S.C. (& Supp. V) 1395 *et seq.*, establishes Medicare, a two-part program of federal assistance for the medical care of the aged and disabled. Part A of the program provides "hospital insurance" benefits for inpatient hospital care and post-hospital extended or home health care and is financed by Social Security payroll contributions. 42 U.S.C. (& Supp. V) 1395c-1935i-2. Part B of the program provides "medical insurance" benefits for physician services and outpatient services and supplies and is financed by the premium payments of those enrolled together

with contributions from funds appropriated by Congress. 42 U.S.C. (& Supp. V) 1395j-1395w. Both parts of the Medicare program are administered by the Health Care Financing Administration (HCFA), a part of the Department of Health and Human Services (HHS). This case involves only Part A of the program.

The principal providers of health care services under Part A are hospitals, skilled nursing facilities, and home health care agencies. Provider participation in the Medicare program is voluntary. Instead of reimbursing Part A Medicare beneficiaries directly, the Secretary of HHS pays the provider for the health care services it has rendered to beneficiaries. The Medicare statute provides for reimbursement only for the "reasonable cost of any services" rendered to Medicare beneficiaries, defined as "the cost actually incurred, excluding therefrom any part of incurred cost found to be unnecessary in the efficient delivery of needed health services." 42 U.S.C. 1395x(v)(1)(A). See also 42 U.S.C. (Supp. V) 1395f(b). Congress has given the Secretary express statutory authority to establish the methods for determining "reasonable costs" for services. See 42 U.S.C. 1395x(v)(1)(A). In addition, Congress has delegated to the Secretary general authority to prescribe regulations necessary to carry out the administration of the Medicare program. 42 U.S.C. 1395hh. The Secretary has exercised this statutory authority by promulgating regulations, 42 C.F.R. Pt. 405 *et seq.*, and a series of Health Insurance Manuals.

Congress created a system of interim payments to Medicare providers and subsequent readjustments to reflect actual costs. A provider receives interim payments at least monthly for its estimated reasonable

costs incurred in furnishing services to Medicare beneficiaries. 42 U.S.C. (& Supp. V) 1395f, 1395g. A provider's annual cost report is audited later to determine the actual costs incurred. See 42 C.F.R. 405.454, 405.1803. Under such an interim payment system it is likely that health care providers will receive overpayments or underpayments at various times. Therefore, Congress instructed the Secretary to "provide for the making of suitable retroactive corrective adjustments where, for a provider of services for any fiscal period, the aggregate reimbursement produced by the methods of determining costs proves to be either inadequate or excessive." 42 U.S.C. 1395x(v)(1)(A)(ii). In addition, Congress provided that interim payments to providers shall include "necessary adjustments on account of previously made overpayments or underpayments." 42 U.S.C. 1395g(a). In response to these congressional directives, the Secretary has issued regulations that provide for the reopening, within a three year period, of any reimbursement determination made by a fiscal intermediary, a hearing officer, the Provider Reimbursement Review Board (PRRB), or the Secretary herself. 42 C.F.R. 405.1885.

Under the Medicare program, a provider may choose to deal with the Secretary through a nongovernmental organization (frequently a private insurance company), known as a "fiscal intermediary." 42 U.S.C. (& Supp. V) 1395h. Such intermediaries, which are nominated by providers, enter into agreements with the Secretary and act on behalf of the Secretary in certain respects. See 42 C.F.R. 421.5(b). The intermediary makes interim payments to the provider for the reasonable cost of services supplied to Medicare beneficiaries and audits the provider's

cost reports. Under the statute the intermediary may also "serve as a center for, and communicate to providers, any information or instructions furnished to it by the Secretary, and serve as a channel of communication from providers to the Secretary." 42 U.S.C. (Supp. V) 1395h(a)(2)(A). An intermediary must reopen and revise any prior determination if, within a three-year period, HCFA notifies the intermediary that the determination is inconsistent with applicable law, regulations, or general instructions issued by the Secretary. 42 C.F.R. 405.1885(b).

When an intermediary is required to reopen and revise one of its earlier determinations it provides notice to the provider in the form of a "Notice of Program Reimbursement." The notice explains the basis for the revision and offers the provider the opportunity to respond by presenting additional evidence or argument. 42 C.F.R. 405.1887. If the provider disagrees with the Notice of Program Reimbursement, and the amount in issue is less than $10,000, it may request an intermediary hearing. 42 C.F.R. 405.1809 *et seq.* If the amount in issue exceeds $10,000, the provider may appeal the matter to the PRRB. 42 U.S.C. (& Supp. V) 1395*oo*; 42 C.F.R. 405.1835. In the PRRB proceeding the provider is entitled to prehearing discovery and a prehearing conference as well as a full hearing. 42 C.F.R. 405.1851 *et seq.* The Secretary may review a decision of the PRRB and may affirm, modify or reverse. A provider may seek judicial review of the Secretary's decision in the appropriate federal district court. 42 U.S.C. (& Supp. V) 1395*oo*(f).

2. Respondent Community Health Services of Crawford County, Inc. (CHS) is a provider of health

care services and has participated in the Medicare program since 1966. CHS chose to have its Medicare payments made through a fiscal intermediary, Travelers Insurance Companies (Travelers). In 1975 CHS began to receive grant funds under the Comprehensive Employment and Training Act of 1973 (CETA), 29 U.S.C. (& Supp. V) 801 *et seq.*, a federal program designed to "provide job training and employment opportunities for economically disadvantaged, unemployed, and underemployed persons * * *." 29 U.S.C. (Supp. V) 801.[1] CHS employed CETA workers, whose salaries and fringe benefits were paid with the federal CETA funds CHS received. CHS included in its Medicare cost reports for 1975, 1976 and 1977 the amount of salaries and fringe benefits paid to CETA workers; however, it did not offset against these costs the federal CETA funds it had received to cover the salaries and benefits. Pet. App. 3a-5a. Accordingly, when it obtained Medicare reimbursement on the basis of its cost reports, CHS in effect received a second, duplicate federal payment for the expenses of the CETA workers.

One of the Secretary's regulations relating to determination of reasonable costs, 42 C.F.R. 405.423(a), provides that grants received by a provider for the purpose of paying specific operating costs "should be deducted from the particular operating cost or group of costs" in computing reimbursable costs. That regulation reflects the principle that a provider may not be reimbursed twice for the same expense. See 42 C.F.R. 405.423(c)(2) ("[i]f such costs are not reduced, the provider would secure reimbursement for

[1] Congress repealed the provisions of CETA as of October 13, 1982, the date of enactment of the Job Training Partnership Act. Pub. L. No. 97-300, § 184(a)(1), 96 Stat. 1357.

the same expense twice; it would be reimbursed through the donor-restricted contributions as well as from patients and third-party payers including [Medicare]"). Section 612 of the Medicare Provider Reimbursement Manual[2] carves out a limited exception to this offset rule; when an earmarked grant constitutes "seed money," the funds need not be offset against the costs for which they are designated. Seed money grants are defined as "[g]rants designated for the development of new health care agencies or for expansion of services of established agencies * * *." Medicare Provider Reimbursement Manual, HIM-15, Pt. I, § 612.2, reproduced in 1 Medicare & Medicaid Guide (CCH) ¶ 5461 (Aug. 1968).

CHS filed its cost reports after consulting with Travelers, its fiscal intermediary, concerning the question of offset of CETA funds. On several occasions, from 1975 to August 1977, Travelers' Medicare Manager, Michael Reeves, orally advised CHS that CETA funds constitute "seed money" and therefore need not be deducted from reimbursable costs in preparing CHS Medicare cost reports.[3] Neither Reeves nor CHS consulted with HCFA concerning

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[2] The Medicare Provider Reimbursement Manual, issued by the Secretary, supplements the Secretary's regulations published in the Code of Federal Regulations. The Manual provides more detailed guidance concerning Medicare reimbursement principles.

[3] The court of appeals stated (Pet. App. 2a, 13a) that Reeves gave CHS this advice on five separate occasions. Neither the PRRB nor the district court made such a finding. During the PRRB hearing, witnesses for CHS and for Travelers differed in their recollections of the number of times Reeves had given such advice. Compare Tr. 73 (PRRB Record at 146) (testimony of John Wallach) with Tr. 122-125 (PRRB Record at 196-199) (testimony of Michael Reeves).

offset of CETA funds during this period. Pet. App. 5a.

In August 1977 Travelers sent a written inquiry to HCFA raising the question whether CETA funds constitute "seed money" and thus are exempt from the general principle of offset. In September 1977 HCFA advised Travelers in writing that if costs of CETA participants are included in the Medicare cost report, CETA funds received by the provider must be offset against those costs. Reeves informed CHS of HCFA's advice by letter (Oct. 7, 1977) and in person (Nov. 9, 1977). Pet. App. 6a. Nevertheless, CHS did not offset the CETA funds in its cost report for the year 1977, which it submitted in February 1978. Travelers proceeded to adjust the 1977 cost report to reflect the receipt of CETA funds. *Id.* at 50a.

In June 1978 Travelers sent CHS written notice that its failure to offset CETA funds had resulted in overpayments for 1975, 1976 and 1977 amounting to $71,480 (C.A. App. 25a-28a). The notice informed CHS of the possibility of establishing an extended repayment schedule if CHS could provide adequate documentation supporting its financial condition and a proposed schedule of payments (*id.* at 25a, 33a). Following receipt of this notice, CHS and three individual recipients of home health care services provided by CHS (respondents Ada Werner, Frank E. Werner, and Shirley Sorger) filed a civil action in the United States District Court for the Western District of Pennsylvania, seeking to enjoin the Secretary from recouping the overpayments. On August 10, 1978, the district court granted a temporary restraining order requiring the Secretary to refrain from recoupment of the overpayments. Pet. App. 7a.

CHS then pursued its administrative remedies before the PRRB.[4]

On March 12, 1980, following an evidentiary hearing, the PRRB ruled that CETA grants do not constitute seed money and must be offset against costs, as required by 42 C.F.R. 405.423 (Pet. App. 49a-54a). While acknowledging CHS's claim that its failure to offset CETA funds was due to the advice it received from the intermediary, the PRRB declined to sanction the failure to offset. It pointed out that "advice by the Intermediary cannot be a substitute for the opinion of the Secretary" (*id.* at 54a).[5]

CHS sought review of the PRRB decision in district court, contending that CETA funds constitute seed money, that it had been denied a full and complete review of the issues, that the Secretary was estopped from recouping any overpayments, that the Secretary should have waived recovery, and that Travelers was independently liable for the overpay-

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[4] Pursuant to a stipulation between the parties, the Secretary has refrained from recouping the overpayments during the pendency of the administrative proceeding and judicial review and has refunded the amounts previously recouped (C.A. App. 107a-108a).

[5] However, the PRRB reversed the proposed adjustments to the 1975 and 1976 cost reports, because the provider had not been given proper notice of reopening (Pet. App. 8a, 53a-54a). The notice for the year 1976 was reissued in compliance with the applicable regulations, but the notice for the year 1975 could not be reissued, since the three year reopening period provided by the regulations had passed. Accordingly, the total amount of adjustment was reduced to $63,839, representing the overpayments for 1976 and 1977. *Id.* at 8a.

The Secretary chose not to review the PRRB decision in this case. Thus, it constituted the final decision of the Secretary.

ments. The district court rejected each of CHS's contentions and granted the Secretary's motion for summary judgment (Pet. App. 36a-48a). The court found that 42 C.F.R. 405.423(a), which governs earmarked grants and gifts, and the Medicare Provider Reimbursement Manual supported the Secretary's ruling that CETA grants are not seed money and that the costs claimed by CHS are not allowable. It concluded that CETA funds plainly are not "designated for the development of new health care agencies" and that "no tortured construction" could bring CETA grants within the seed money exception (Pet. App. 40a).

The district court also rejected CHS's estoppel argument. The court suggested that estoppel may lie against the government "in certain limited circumstances" (Pet. App. 41a). However, it ruled that any estoppel contention was defeated by the existence of the Secretary's regulation permitting the reopening of reimbursement determinations within a three year period and the obvious fact that CHS was being reimbursed twice for the same expense. The court stated (*id.* at 42a):

> The Medicare regulations allow the intermediary to reopen the cost reports up to three years after they have been approved. Thus, CHS relied at its own risk in accepting the intermediary's advice since plaintiff was on notice that all such reports were subject to review. Moreover, the fact that CHS was being reimbursed twice for the same expense should have been a red flag that its windfall was not supportable under the Act.

Finally, the district court rejected CHS's claims that it had not received a full review before the

PRRB, that the Medicare statute entitled it to waiver of the overpayments, and that Travelers was independently liable to CHS for the failure to render accurate advice concerning the treatment of CETA funds. The court held that mistakes of judgment do not constitute activity outside the intermediary's scope of authority when such mistakes in the treatment of cost items were anticipated by the reopening provision of 42 C.F.R. 405.1885. The court found "no evidence of willful or wanton misconduct" by Reeves. Pet. App. 46a.

3. A divided panel of the court of appeals reversed (Pet. App. 1a-33a). Although it recognized the traditional reluctance of courts to estop the government, the court of appeals nonetheless held that the Secretary should be estopped from recovering the overpayments made to CHS.

The court of appeals viewed this Court's decision in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), as supporting the principle that "estoppel may be properly applied against the government under certain circumstances" (Pet. App. 10a). In addition, the court concluded that the Court's decisions in *INS* v. *Hibi*, 414 U.S. 5 (1973), and *Montana* v. *Kennedy*, 366 U.S. 308 (1961), gave "tacit recognition" to the use of estoppel against the government upon a finding of "affirmative misconduct." The court characterized *Schweiker* v. *Hansen* as implying "that one example of affirmative misconduct is the failure of a government employee to perform an act that is required by law" (Pet. App. 11a) and concluded that Travelers had engaged in such "affirmative misconduct." The court reasoned that the intermediary had an unambiguous duty, imposed by statute and its agreement with the Secretary, to communicate to the

Secretary at an early date the provider's inquiry regarding CETA funds, and that had the intermediary performed this "legally binding procedure," CHS would not have been misled (*id.* at 15a-16a).

The court of appeals distinguished this Court's decisions regarding estoppel on various grounds (Pet. App. 16a-21a). It distinguished *FCIC* v. *Merrill*, 332 U.S. 380 (1947), on the ground that there was "no source to which CHS could have gone to ascertain whether the government agent's advice was wrong" (Pet. App. 17a). The court dismissed 42 C.F.R. 405.423, the Secretary's regulation requiring the offset of earmarked grants against costs, as possessing "no clear meaning" (Pet. App. 17a). The court did not mention either the requirement of 42 U.S.C. (& Supp. V) 1395g that there be retroactive adjustments to account for overpayments or underpayments to providers or 42 C.F.R. 405.1885, the Secretary's regulation authorizing reopening of intermediary reimbursement determinations within three years. Instead, the court emphasized "the injustice to CHS and the people it serves if it is required to refund the alleged overpayments" (Pet. App. 21a), remarking that the excess Medicare funds received by CHS had been used "to meet serious human needs" (*ibid.*).

Judge Meanor dissented (Pet. App. 23a-33a). In his view, the government cannot be estopped when the result would be to "render to the opponent a benefit to which he was never substantively entitled" (*id.* at 24a). Judge Meanor found this Court's decision in *FCIC* v. *Merrill* to be controlling: "The only difference between *Merrill* and this case is that here the plaintiffs have received the funds in dispute, whereas in *Merrill* the insurance proceeds never were paid. I can think of no way in which this factual dif-

ference can lead to a principled distinction." Pet. App. 26a. Judge Meanor concluded that estopping the government in a case like this one "amounts to no more than a court authorized raid on the public treasury" (*id.* at 32a).

SUMMARY OF ARGUMENT

The court of appeals erred in holding that the Secretary of Health and Human Services may be estopped from recovering excess Medicare payments made to respondent CHS on the ground that a fiscal intermediary had advised CHS that the costs at issue were reimbursable.

1. This Court has consistently held that the federal government may not be equitably estopped from enforcing the laws. This doctrine is grounded on both strong policy considerations and constitutional principles. It protects the public from the consequences of erroneous conduct by government employees and ensures that the Executive faithfully carries out legislative mandates by preventing actions of agency representatives from overriding the will of Congress.

The rule against estoppel of the federal government has particular force in cases like this one, in which the result of estoppel would be to require the expenditure of public funds contrary to the express directions of Congress. Here the results of estoppel are to override the Secretary's statutorily authorized determination of "reasonable cost," to allow CHS a double recovery of federal funds for the same expense, and to nullify the procedure Congress has mandated for recovery of Medicare overpayments. The court of appeals' decision clearly contravenes this Court's injunction " 'to observe the conditions defined by Con-

gress for charging the public treasury.'" *Schweiker* v. *Hansen*, 450 U.S. 785, 788 (1981), quoting *FCIC* v. *Merrill*, 332 U.S. 380, 385 (1947).

2. Even if estoppel of the government were proper in some cases, it would not be appropriate here. As a threshold matter, CHS failed even to establish that it satisfied the requirements for estoppel of a private party, including reasonable reliance and detriment.

a. Reliance on erroneous advice can never be reasonable where, as here, there is an express statutory provision mandating correction of erroneous determinations and recovery of overpayments. Both the Medicare statute and the Secretary's regulations establish a system of interim payments and subsequent audit and recovery of payments that are found to be inconsistent with applicable law, regulations, or HCFA instructions. Thus, it is clear from the statute and regulations that the intermediary did not have the authority to make final determinations.

Reliance on erroneous advice also can never be reasonable where the advice on its face appears to be inconsistent with written regulations or guidelines. Here the intermediary's advice concerning treatment of the expenses of CETA employees appeared to conflict with the Secretary's published regulation concerning offset of donor-restricted funds and her written instructions concerning the "seed money" exception; in addition, the advice led to double reimbursement—the situation against which the regulation was expressly directed.

b. CHS also failed to demonstrate that it would suffer detriment in the absence of estoppel. The only harm CHS alleged—repayment of funds it was never entitled to receive—simply cannot qualify as detriment for purposes of estoppel. Nor can CHS's expenditure of the excess Medicare funds for non-

Medicare purposes or its allegation that it would have to cut services to its clients if it were required to repay the funds transform repayment into the sort of detriment that would justify estopping the government from recovering the funds.

3. a. Even if estoppel of the government were proper in some circumstances and CHS made a threshold showing that would support estoppel of a private party, CHS still could not prevail in this case. On several occasions this Court has declined to decide whether there might be an exception to the general rule against estoppel of the federal government for cases in which there has been "affirmative misconduct" by a government representative. See, *e.g.*, *Schweiker* v. *Hansen*, 450 U.S. at 788. In our view, there should be no such "affirmative misconduct" exception.

Estoppel in the case of "affirmative misconduct" presents the same dangers that prompted the general rule against estoppel of the government. Indeed, the more egregious the conduct of a government employee, the less reasonable it is to attribute that conduct to the government and to prohibit the government from insisting on compliance with valid statutes or regulations. In addition, the concept of "affirmative misconduct" has no fixed content and, as a result, has encouraged both needless litigation and erroneous decisions.

b. In any event, the facts of this case clearly would not fit an "affirmative misconduct" exception. The intermediary's erroneous advice was at most negligent or a mistake in judgment. The intermediary's conduct was similar to that at issue in cases such as *Schweiker* v. *Hansen*, *supra*, and *FCIC* v. *Merrill*, *supra*, in which this Court declined to estop the government.

ARGUMENT

THE SECRETARY OF HEALTH AND HUMAN SERVICES MAY NOT BE ESTOPPED FROM RECOVERING EXCESS MEDICARE PAYMENTS MADE TO CHS ON THE GROUND THAT A FISCAL INTERMEDIARY PREVIOUSLY HAD ADVISED CHS THAT THE PAYMENTS WERE ALLOWABLE

The court of appeals held that the Secretary of HHS may be estopped from recovering Medicare funds erroneously paid to CHS as reimbursement for certain costs on the ground that a fiscal intermediary, the Travelers Insurance Companies, had advised CHS that those costs were reimbursable under the Medicare statute. The court reached this result despite the facts that CHS was not entitled to receive the funds under the Medicare statute and regulations and that Congress has expressly directed the Secretary to recover overpayments made to Medicare providers. This decision is plainly erroneous.

A. This Case Is Governed By The Reasonable And Well-Established Principle That The Government May Not Be Estopped From Enforcing The Laws

This Court has consistently and repeatedly held that the federal government may not be equitably estopped from enforcing the public laws, even though private parties may, as a result, suffer hardship in particular cases. See, *e.g.*, *Lee* v. *Munroe*, 11 U.S. (7 Cranch) 366 (1813); *Gibbons* v. *United States*, 75 U.S. (8 Wall.) 269, 274 (1868); *Hart* v. *United States*, 95 U.S. 316, 318-319 (1877); *Pine River Logging Co.* v. *United States*, 186 U.S. 279, 291 (1902); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917); *Sutton* v. *United States*, 256 U.S. 575, 579 (1921); *Utah* v. *United States*, 284 U.S. 534, 545-546 (1932); *Wilber National*

Bank v. *United States*, 294 U.S. 120, 123-124 (1935); *United States* v. *Stewart*, 311 U.S. 60, 70 (1940); *FCIC* v. *Merrill*, 332 U.S. 380 (1947); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957); *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981); *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982). The government is "neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." *Utah Power & Light Co.* v. *United States*, 243 U.S. at 409. We know of no decision of this Court holding that equitable estoppel lies against the government in any circumstance.[6] The rule against

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[6] In several cases (*e.g.*, *INS* v. *Miranda*, slip op. 5; *Schweiker* v. *Hansen*, 450 U.S. at 788) the Court has expressly declined to determine whether the government could be estopped in a case involving serious affirmative misconduct by government employees. However, the Court has never identified a case in which the facts established such misconduct. See pages 36-43, *infra*, for discussion of a possible "affirmative misconduct" exception to the rule against estopping the government.

Professor Davis has cited *Moser* v. *United States*, 341 U.S. 41 (1951), as inconsistent with the numerous decisions barring estoppel of the federal government. 4 K. Davis, *Administrative Law Treatise* § 20:4 (2d ed. 1983). See also, *e.g.*, *United States* v. *Lazy FC Ranch*, 481 F.2d 985, 988-989 (9th Cir. 1973). However, *Moser* does not appear to involve the issue of estoppel. In *Moser* the Court concluded that the petitioner in that case should not be held to have lost his opportunity for citizenship despite the facts that he had sought exemption from military service on the ground that he was a neutral alien and that the Selective Training and Service Act of 1940 provided that those who claimed such an exemption would be barred from citizenship. The Court expressly declined to base its decision on principles of estoppel. 341 U.S. at 47. Instead, it held that Moser had not knowingly and intentionally waived

estoppel of the government has been applied to misrepresentations of law (*Schweiker* v. *Hansen*), misrepresentations of fact (*Lee* v. *Munroe*), oral misrepresentations (*Utah* v. *United States*), written misrepresentations (*Lee* v. *Munroe*), misrepresentations in the form of longstanding administrative rulings (*Automobile Club* v. *Commissioner*), and off-hand remarks by government employees (*Montana* v. *Kennedy*). The principle clearly applies to the intermediary's erroneous advice in this case.

The doctrine that the government may not be equitably estopped from enforcing the laws is grounded in reason and necessity and, ultimately, on constitutional principles. The doctrine serves the public interest by protecting the government (and the public treasury) from the consequences of errors by misinformed employees and representatives. Without such protection, there can be no assurance that the Executive will be able to fulfill its constitutional responsibility by faithfully executing the duties assigned to it by Congress. As this Court stated in what is perhaps the earliest case involving a claim of estoppel against the government, "[i]t is better that an individual should now and then suffer by * * * mistakes [of government officials], than to introduce a rule against an abuse, of which, by improper collusions, it would be very difficult for the public to protect itself." *Lee* v. *Munroe*, 11 U.S. at

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his rights to citizenship, since he had followed a revised procedure for exemption under which the Department of State had deleted the express waiver of citizenship from the applicable form. The fact that this Court has never cited *Moser* in any subsequent case involving a claim of estoppel against the government confirms the view that the holding in that case does not bear on the question of estoppel.

370. Accord, *Whiteside* v. *United States*, 93 U.S. 247, 257 (1876); *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, 681 (1868).

The rationale for the doctrine that the government may not be equitably estopped is the same as that for the rule that (except where Congress otherwise provides) the sovereign is exempt from the consequences of its laches and from the operation of statutes of limitations: "Regardless of the form of government and independently of the royal prerogative once thought sufficient to justify it, the rule is supportable now because its benefit and advantage extend to every citizen, including the defendant, whose plea * * * it precludes * * *." *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 132 (1938). Such doctrines are based on "the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers." *United States* v. *Hoar*, 26 F.Cas. 329, 330 (C.C.D. Mass. 1821) (No. 15,373) (Story, Circuit Justice). See also *Costello* v. *United States*, 365 U.S. 265, 281 (1961).

Rules such as these are essential because it is simply impossible for the federal government to exercise complete control over every one of its employees and agents. Despite good faith efforts to avoid mistakes, the government cannot eradicate completely the instances in which it will be necessary to overrule some erroneous advice or action by an employee on which a private party may have relied. Indeed, over 150 years ago, when there were only a fraction of the present number of government employees, Justice Story observed that the government's "fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not

save the public from the most serious losses," if equitable doctrines applicable to private suits were to govern. *United States* v. *Kirkpatrick*, 22 U.S. (9 Wheat.) 720, 735 (1824). See also *Dox* v. *Postmaster-General*, 26 U.S. (1 Pet.) 318, 325-326 (1828) (Marshall, C.J.).

The principle that the government may not be equitably estopped has its roots in the constitutional doctrine of separation of powers, as well as in the doctrine of sovereign immunity. If the judiciary were free to impose otherwise unauthorized liability on the government, based only on its own notions of equity, the mandates of Congress could easily be overridden. The effect of estopping the government is to raise employees and other representatives of the Executive Branch to the status of legislators by giving their representations the force of law, in preference to the conditions established by Congress itself. The Court has rejected such a result. See, *e.g.*, *Dixon* v. *United States*, 381 U.S. 68, 73 (1965) (IRS Commissioner's erroneous tax rulings); *Snyder* v. *Buck*, 340 U.S. 15, 19 (1950) (agreement by Solicitor General concerning substitution of successor after expiration of statutory period); *United States* v. *San Francisco*, 310 U.S. 16, 31-32 (1940) (administrative interpretations of the Department of the Interior).

This doctrine applies with special force in cases like this one, in which the result of estopping the government is to require expenditure of public funds contrary to the express mandate of Congress. See U.S. Const., Art. 1, § 9, Cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"). Such cases implicate the core of the concerns that underlie the doctrine. Here Congress expressly limited Medicare re-

imbursement to the "reasonable cost" of services provided and delegated to the Secretary the authority to promulgate rules defining that term. 42 U.S.C. 1395x(v)(1)(A). The Secretary complied with this directive by, inter alia, excluding from the definition of "reasonable cost" those expenses that are offset by donor-restricted funds, in order to avoid double reimbursement. See pages 8-9, *supra*. CHS nevertheless submitted cost reports in which it claimed reimbursement for salaries and fringe benefits of CETA employees, but failed to offset the federal CETA funds it had received to cover those expenses. Because CETA funds are not within the seed money exception to the Secretary's offset rule,[7] the reimbursement CHS claimed and received exceeded the "reasonable cost" of services provided, so that it received more than the amount to which it was entitled under the Medicare statute. In fact, CHS received Medicare funds to cover costs that already had been reimbursed by funds it received under a different federal program (CETA). The Secretary, again pursuant to Congress's explicit direction, reopened CHS's cost reports, adjusted them to account for the failure to offset, and took steps to recover the overpayments.

The result of the court of appeals' decision to estop the government in this case is to override the Secre-

[7] Both the PRRB and the district court concluded that the CETA funds received by CHS clearly could not be characterized as "seed money" as that term is used in the Medicare program (Pet. App. 39a-40a, 52a-53a), and the court of appeals declined to rule on this question (*id.* at 23a). For purposes of deciding the issue of estoppel, which is the only issue decided by the court of appeals and presented to this Court, it must be assumed that the PRRB and the district court correctly concluded that CETA funds do not come within the seed money exception.

tary's statutorily authorized determination of "reasonable cost," to allow CHS a double recovery of federal funds for the same expense, and to nullify the procedure Congress has mandated for the recovery of Medicare overpayments. The decision in effect elevates the intermediary's advice over the express will of Congress, to the detriment of federal taxpayers. Estoppel of the government in these circumstances contravenes this Court's injunction to the lower courts to be careful " 'to observe the conditions defined by Congress for charging the public treasury.' " *Schweiker* v. *Hansen*, 450 U.S. at 788, quoting *FCIC* v. *Merrill*, 332 U.S. at 385. As Judge Meanor observed (Pet. App. 32a), it "amounts to no more than a court authorized raid on the public treasury."

This case illustrates the reasonableness of the rule against estopping the government. Permitting estoppel in cases like this one has serious ramifications for government operations. By permitting CHS to retain funds to which it is not entitled, contrary to the terms of the Medicare statute and the Secretary's lawful regulations, the court of appeals has opened the door to countless claims by providers, each of which may allege that it was orally advised by its fiscal intermediary that it was appropriate to claim reimbursement for certain costs. The reasoning of the court of appeals is not confined to the Medicare program. There are many other federal programs that involve distribution of federal funding in the form of grants, benefits, loans, or guarantees (including other massive social welfare programs created by the Social Security Act). Congress set up many of these programs so that funds are paid out on an ongoing basis, prior to any detailed audit of expenditures. Efficient operation of such programs and protection of the public

fisc requires that there be a system of interim or advance payments, with subsequent recovery of erroneous overpayments.

It would lead to intolerable burdens and would require the expenditure of substantial sums of public monies, contrary to the dictates of Congress, if recipients could retain federal funds to which they were not statutorily entitled whenever they had claimed the funds following receipt (or alleged receipt) of incorrect advice from a government representative. As the Second Circuit has observed, "[t]he government could scarcely function if it were bound by its employees' unauthorized representations. Where a party claims entitlement to benefits under federal statutes and lawfully promulgated regulations, that party must satisfy the requirements imposed by Congress." *Goldberg* v. *Weinberger*, 546 F.2d 477, 481 (2d Cir. 1976), cert. denied, 431 U.S. 937 (1977). Thus, this Court's doctrine precluding estoppel of the government—supported by important public policy and constitutional considerations—should apply to bar estoppel in this case.

We note that the doctrine that the government may not be equitably estopped does not mean that private parties never have a remedy in cases in which they have reasonably relied to their detriment on a government employee's erroneous advice. Congress itself has provided that in some types of cases the government may be bound by its agents' representations. For example, Section 9 of the Portal-to-Portal Act of 1947, 29 U.S.C. 258, which relates to wage-hour violations occurring before May 14, 1947, permits reliance on the advice of "any agency of the United States," whether the advice was by regulation, ruling, order, approval, interpretation, administrative practice or enforcement

policy. In other cases, Congress has enacted provisions giving federal agencies the discretion to waive certain statutory requirements when the agencies conclude that circumstances make it equitable to do so. Congress has included a number of such waiver provisions in the Social Security Act. See, *e.g.*, *Califano* v. *Yamasaki*, 442 U.S. 682 (1979) (construing 42 U.S.C. (& Supp. V) 404, a provision for waiver of recoupment under Title II of the Social Security Act). See also 442 U.S. at 693-694 n.9 (listing other waiver provisions under various statutes). Indeed, the Medicare statute provides for waivers of recoupment in cases of overpayments arising from noncovered or excluded services (42 U.S.C. 1395gg(b) and (c)). See Pet. App. 42a-44a. However, Congress has not provided for waivers in cases like this one, involving recoupment of overpayments to providers arising from erroneous "reasonable cost" determinations. See *id.* at 44a. The inclusion of waiver provisions applicable to some situations suggests that Congress did not mean for the courts to impose similar sorts of remedies in other types of cases. See *Lehman* v. *Nakshian*, 453 U.S. 156, 162-163 (1981). In view of Congress's decision to provide for waiver of recoupment in some types of Medicare cases, but not in respondent's situation, the rule against estoppel of the government should apply with particular strength.

B. Even If The Government May Be Estopped In Some Circumstances, Estoppel Is Clearly Inappropriate In This Case Because CHS Failed Even To Establish That It Satisfied The Requirements For Estoppel Of A Private Party

Assuming arguendo that the Court should decide to depart from the well-established principle that the government may not be equitably estopped, estoppel

nonetheless is inappropriate here because CHS did not even make the necessary threshold showing, *i.e.*, that the circumstances of this case satisfy the requirements for estoppel under the law applicable to private parties. There can be no question that a court should not even consider estopping the federal government if the opposing party has not made a showing that would support equitable estoppel of a private party. See, *e.g.*, *Wilber National Bank* v. *United States*, 294 U.S. 120, 124 (1935); *Pratte* v. *NLRB*, 683 F.2d 1038, 1043-1044 (7th Cir. 1982). Thus, it seems reasonable to expect that a court, before reaching the question whether the government may be estopped, would consider first whether a party has established facts that would justify estoppel in purely private litigation.[8]

The court of appeals ignored this threshold requirement. Although the court below recognized that it is necessary to show both reasonable reliance on a misrepresentation and detriment in order to support the application of equitable estoppel (see Pet. App.

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[8] Despite the reasonableness of this approach, lower courts sometimes fail to determine initially whether the party urging estoppel has made such a showing. See, *e.g.*, *Fox* v. *Morton*, 505 F.2d 254 (9th Cir. 1974); *Parrish* v. *Loeb*, 558 F. Supp. 921 (C.D. Ill. 1982); *Dempsey* v. *Director, FEMA*, 549 F. Supp. 1334 (E.D. Ark. 1982). In other cases, lower courts appear to apply a loose version of the traditional standards—one that is far less favorable to the government than to a private party in a similar position. See, *e.g.*, *Home Savings & Loan Ass'n* v. *Nimmo*, 695 F.2d 1251 (10th Cir. 1982), petition for cert. pending, No. 83-277. But the considerations described in the preceding section indicate rather that courts should take particular care in determining whether a party seeking to estop the government has established the traditional elements of estoppel.

9a),[9] the court did not stop to determine whether CHS had made an adequate showing with respect to either of these traditional elements of estoppel. Instead, it proceeded to consider whether existing case law concerning estoppel of the government left room for estoppel of the Secretary in the circumstances of this case. But it seems clear that CHS failed to prove either reasonable reliance or detriment. Thus, the court of appeals need never have reached the issue of when estoppel of the government may be justified.

1. The element of reasonable reliance on the advice of a government agent can never exist where, as here, there is an express statutory provision for correction of erroneous determinations and recovery of overpayments. The existence of such a provision clearly indicates to every person covered by the statute that initial decisions are subject to change when errors are discovered and that funds paid out erroneously may be taken back.

Congress anticipated reimbursement errors under the Medicare payment scheme and expressly directed the Secretary to make necessary adjustments in reimbursement "on account of previously made overpayments or underpayments" (42 U.S.C. 1395g(a)) and to "provide for the making of suitable retroactive corrective adjustments" in the case of under-

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[9] A number of courts describe the traditional test for estoppel of a private party as follows: (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that his conduct be acted on or must act in such a way that the party asserting estoppel has a right to believe it is so intended; (3) the party asserting estoppel must have been ignorant of the facts; and (4) the party asserting estoppel must have reasonably relied on the other party's conduct to his substantial injury. *Pratte* v. *NLRB*, 683 F.2d at 1041.

payments or overpayments to a provider (42 U.S.C. 1395x(v)(1)(A)). All providers, including CHS, presumably are aware of this statutory system of interim payments and subsequent audit and recovery of overpayments. In addition, the Secretary, in response to Congress's directives, has promulgated regulations that make clear that any determination by a fiscal intermediary is subject to reopening and revision within a three-year period, on the basis that it has been found to be inconsistent with applicable law, regulations, or general instructions issued by HCFA (42 C.F.R. 405.1885). Both statutory and administrative provisions thus plainly state that the Secretary and the courts have the final word on what payments to providers are permissible under the Medicare statute.

Under such a statutory scheme a provider could never *reasonably* rely on an intermediary's advice because it is clear that the intermediary does not have the authority to make any final determination concerning the interpretation of statutes, regulations or instructions or otherwise to bind the Secretary through erroneous advice. CHS, which had become a Medicare provider voluntarily almost a decade before the events at issue here, surely was aware of the risks and responsibilities it assumed under the statutory scheme, as well as the benefits involved. As the district court observed (Pet. App. 42a), in view of the regulation providing for reopening of cost reports, "CHS relied at its own risk in accepting the intermediary's advice since [CHS] was on notice that all such reports were subject to review." [10]

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[10] See *Woodstock/Kenosha Health Center* v. *Schweiker*, 713 F.2d 285, 291 (7th Cir. 1983) (it is particularly inappropriate "to apply the * * * equitable [estoppel] doctrine to protect

There is an additional reason why CHS's reliance cannot be characterized as reasonable: the intermediary's oral advice on its face appeared inconsistent with the Secretary's published regulations and written instructions. In compliance with Congress's directive that she promulgate regulations defining the "reasonable cost" of services provided under Medicare (42 U.S.C. 1395x(v)(1)(A)), the Secretary has required that grants earmarked for paying specific operating costs be offset against those costs for purposes of Medicare provider claims (42 C.F.R. 405.423 (a) and (c)(2)). The regulation states clearly (42 C.F.R. 405.423(c)(2)) that it is designed to avoid situations in which a provider receives double re-

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skilled professionals operating in their area of expertise with the government on an intimate and long-term basis").

The court of appeals was plainly wrong in suggesting (Pet. App. 5a, 13a, 18a-19a) that CHS had no choice but to seek and follow the advice of the intermediary, or that CHS was "induced" to claim the excess funds. CHS was not obliged to accept unquestioningly the intermediary's advice or to act on it, especially when the advice on its face appeared to conflict with written regulations and guidelines (see pages 30-32, *infra*). When it is clear that erroneous advice will lead to overpayments and that the statute and regulations provide for recovery of such overpayments, the provider must exercise independent judgment. Moreover, the court of appeals erred in its assumption (Pet. App. 5a, 18a-19a) that CHS could not have communicated with HCFA on this matter and thus was forced to depend on the intermediary's advice; we are aware of no written or unwritten policy that prohibits a provider from submitting nonroutine inquiries to HCFA, and such inquiries are not uncommon. CHS itself appears to have acknowledged below that providers are not precluded from contacting the Secretary directly. See *id.* at 15a.

imbursement for the same expenses.[11] The Secretary has created a limited exception to the rule concerning offset of earmarked grants in the case of "seed money" grants, which are defined as grants made for the purpose of establishing or expanding health care agencies.[12] Neither the regulation nor the description of

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[11] 42 C.F.R. 405.423(c)(2) provides:

> Donor-restricted funds which are designated for paying certain hospital operating expenses should apply and serve to reduce these costs or group of costs * * *. If such costs are not reduced, the provider would secure reimbursement for the same expense twice; it would be reimbursed through the donor-restricted contributions as well as from patients and third-party payers including the title XVIII health insurance program.

[12] The Medicare Provider Reimbursement Manual, HIM-15, Pt. I, § 612.2, reproduced in 1 Medicare & Medicaid Guide (CCH) ¶ 5461 (Aug. 1968), provides:

> Grants designated for the development of new health care agencies or for expansion of services of established agencies are generally referred to as "seed money" grants. "Seed money" grants are not deducted from costs in computing allowable costs. These grants are usually made to cover specific operating costs or group of costs for services for a stated period of time. During this time, the provider will develop sufficient patient caseloads to enable continued self-sustaining operation with funds received from Medicare reimbursement as well as from funds received from other patients or other third-party payers.

Section 612 is entitled "Public Health Service Grants." As the Manual indicates, "seed money" grants generally are one-time grants. Examples include grants under the Health Underserved Rural Areas program, 42 U.S.C. (Supp. V) 1310, and grants under the Rural Health Initiative Program, 42 U.S.C. (& Supp. V) 254c. Part A Intermediary Letter No. 79-47, reproduced in [1979-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 30,110 (Dec. 1979).

the "seed money" exception found in the Medicare Provider Reimbursement Manual makes any mention of an exception for CETA grants. In addition, CETA grants do not fit the definition of seed money, since they are not designated for the development of new health care agencies or for expansion of services of established agencies (see note 12, *supra*).[13] Finally, as the district court found (Pet. App. 42a), the fact that CHS was receiving double payment for the expenses of hiring CETA employees should have been a "red flag" to CHS. Thus, CHS clearly had reason to question the intermediary's advice. Indeed, the fact that CHS claims to have consulted the intermediary on a number of occasions about the treatment of CETA funds (see page 9, *supra*) suggests that it had continuing doubts about the advice it was receiving.

On this record, it is apparent that CHS failed to demonstrate reasonable reliance as a matter of

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[13] CETA funds were not directed specifically to health care agencies, but were intended to "provide job training and employment opportunities for economically disadvantaged unemployed and underemployed persons * * *." See 29 U.S.C. (Supp. V) 801. The district court noted that "no tortured construction" could bring CETA grants within the seed money exception (Pet. App. 40a).

CHS contended below that CETA funds should be considered to be seed money, because the contract under which it received the funds stated that they would be used to supplement, rather than supplant, the level of funds otherwise available. See Pet. App. 51a. However, the statutory condition referred to in the contract, Section 703(11) of CETA, makes clear that the reference is to supplementation of *non-federal* sources of funds. See 29 U.S.C. 983(11) (formerly Title VI, Section 603(11) of Pub. L. No. 92-203, 87 Stat. 878).

law. Reliance on erroneous advice can never be reasonable if (1) such reliance is inconsistent with a statutory or regulatory system under which erroneous determinations are reopened and corrected; or (2) the advice received appears to be inconsistent with the terms of a statute, published regulation, or written instruction accessible to the recipient. Under the law governing estoppel of private parties, there can be no estoppel unless the party asserting the estoppel lacks both knowledge and the means of knowledge of the truth about the facts in question. See *Goodwin* v. *Hartford Life Insurance Co.*, 491 F.2d 332 (3d Cir. 1974) (declining to estop an insurance company from denying liability where eligibility for coverage was defined in the insurance policy and contract); *In re Watt Estate*, 409 Pa. 44, 65-66, 185 A.2d 781, 792 (1962).

Those dealing with the federal government are charged with knowledge of federal statutes and regulations. *FCIC* v. *Merrill*, 332 U.S. at 384-385; *Cooke* v. *United States*, 91 U.S. 389, 401-402 (1875); *Wolfson* v. *United States*, 492 F.2d 1386, 1392 (Ct. Cl. 1974); 44 U.S.C. 1507. It is not unreasonable to expect that such persons will familiarize themselves with the governing law and will act on the basis of that authority. Statutes and regulations give fair warning to those who deal with an agency that it would be inappropriate to accord undue weight to initial determinations of an agency representative, since such determinations may well be overruled at some point. It is, in short, difficult to imagine any circumstances in which reliance on erroneous advice of a government representative would be reasonable in the situations we have described.

2. CHS also failed to demonstrate another element necessary to estoppel of a private party—that it would suffer detriment if the Secretary were not estopped. Absent estoppel CHS would be required to repay the Medicare funds it received as a result of its failure to offset CETA grant funds against the costs of CETA employees in its Medicare cost reports. But that result cannot qualify as detriment for purposes of estoppel. Because the Secretary has determined that the funds at issue here are not "reasonable costs" within the meaning of the Medicare statute, CHS never had any right to receive the funds. See pages 23 n.7, 31-32, *supra*. In fact, CHS has been reimbursed twice by the federal government for the salaries and fringe benefits it paid to CETA workers, once with CETA funds and again with Medicare funds. Requiring CHS to return the Medicare payments to which it was never entitled simply does not amount to detriment. In fact, quite the reverse is true; allowing CHS to retain the Medicare payments gives it a windfall.

The court of appeals found it significant that CHS had incurred obligations based on the advice it received (*i.e.*, that it had claimed the Medicare funds and used them for non-Medicare purposes) (Pet. App. 2a, 19a). CHS asserted below that it had used the extra funds it received for worthy purposes, *i.e.*, to render health care services to the public. But it would be entirely inappropriate to preclude the Secretary from carrying out Congress's express directive to recover Medicare overpayments simply because the recipients of such funds had spent them. See *Bell* v. *New Jersey*, No. 81-2125 (May 31, 1983), slip op. 14 n.15 ("we would find it difficult to believe that Congress meant to permit States to obtain

good title to funds otherwise owing to the Federal Government by the simple expedient of spending them"). Of course, no one required or even "induced" CHS to expend the excess funds it received; ultimately, it was CHS's choice to take the risk of doing so, in the knowledge that the statute requires that retroactive adjustments be made in the case of overpayments.

CHS contends that it is unable to repay the excess Medicare funds it received and that it would have to cease or curtail services to its clients if it were required to repay. See, *e.g.*, Br. in Opp. 13 ("recoupment of the alleged overpayments would likely cause CHS to close its doors").[14] The court of appeals appears to have been particularly impressed by this contention. Pet. App. 21a. However, CHS's assertion relates to the propriety of the Secretary's recoupment methods rather than the validity of recoupment itself. See *Bell* v. *New Jersey*, slip op. 5 n.4. Moreover, the court of appeals overlooked the fact that there are ways to avoid the dire consequences predicted by CHS. When Travelers notified CHS that it was required to repay the excess funds it had received, it advised CHS of the option of an extended repayment schedule and requested financial information that would support such repayment terms (C.A. App. 25a-26a). CHS apparently did not pursue this possibility, which could have alleviated its financial concerns.[15]

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[14] But see the testimony of CHS's director before the PRRB (Tr. 61; PRRB Record at 134), noting that for the 1979-1980 fiscal year CHS had a budget of $900,000.

[15] See also the Federal Claims Collection Act of 1966, 31 U.S.C. 951 *et seq.* (authorizing compromise of a claim or termination of collection action under certain conditions, including inability to pay, in appropriate cases).

In sum, recoupment of erroneously paid funds to which the recipient has no statutory entitlement rarely, if ever, can constitute the sort of detriment required to support estoppel. In the long run, a party that must repay such funds is in no worse position than if it had never received the funds in the first place. Principles of equity surely do not require estoppel in cases in which the result would be a financial windfall for the recipient of erroneously paid funds.

C. Assuming Arguendo That CHS Made A Threshold Showing Sufficient To Warrant Estoppel Of A Private Party, This Case Does Not Satisfy Any "Affirmative Misconduct" Exception To The General Rule That The Federal Government May Not Be Estopped

Even if CHS had made a showing sufficient to support estoppel of a private party, it could not prevail, because it is the federal government, rather than a private party, that CHS seeks to estop. See pages 18-26, *supra*. Assuming arguendo that estoppel of the government may be appropriate in some circumstances, a party clearly must show more than the traditional elements applicable to estoppel in private litigation. CHS has not made such an additional showing.

1. In several cases this Court has declined to decide whether "affirmative misconduct" by a government representative might justify an exception to the general principle that the federal government may not be equitably estopped. See *INS* v. *Miranda*, slip op. 3, 5; *Schweiker* v. *Hansen*, 450 U.S. at 788; *INS* v. *Hibi*, 414 U.S. at 8. See also *Montana* v. *Kennedy*, 366 U.S. at 315. The Court has never identified a case in which the facts established the sort of

misconduct that might warrant estoppel. Nevertheless, in this case and others involving claims of estoppel against the federal government, the lower courts have seized on statements in this Court's decisions as support for an "affirmative misconduct" exception. See, *e.g.*, Pet. App. 10a (stating that the Supreme Court has "acknowledged that estoppel may be properly applied against the government under certain circumstances" and has given "tacit recognition" to the theory of estoppel because of the affirmative misconduct of a governmental official). The lower courts have purported to find "affirmative misconduct" by the government in a variety of circumstances.[16]

The notion that there may be an "affirmative misconduct" exception to the general rule that the federal government may not be estopped appears to have

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[16] In addition to this case, see, *e.g.*, *Miranda* v. *INS*, 673 F.2d 1105 (9th Cir. 1982), rev'd, No. 82-29 (Nov. 8, 1982) (failure of INS to act on visa petition for 18-month period); *United States* v. *Wharton*, 514 F.2d 406 (9th Cir. 1975) (erroneous advice concerning possibility of filing application to obtain title to land); *Tennessee ex rel. Leech* v. *Dole*, 567 F. Supp. 704, 721 (M.D. Tenn. 1983), appeal pending, No. 83-549 (6th Cir.) (allegedly inconsistent positions taken by Department of Justice and Department of Transportation with respect to state's obligation to reimburse federal government from state's recovery of overcharges from highway project bid-riggers); *Hanover Building Materials, Inc.* v. *Guiffrida*, C.A. No. A-81-CA-426 (W.D. Tex. May 9, 1983), appeal pending, No. 83-1471 (5th Cir.) (payment of flood insurance claims not authorized by regulation and continued acceptance of premiums); *McDonald* v. *Schweiker*, 537 F. Supp. 47 (N.D. Ind. 1981) (erroneous representation that plaintiff needed additional calendar quarters of work in order to apply for benefits); *Armstrong* v. *United States*, 516 F. Supp. 1252 (D. Colo. 1981) (erroneous advice concerning plaintiff's active duty status and eligibility for benefits).

originated in *Montana* v. *Kennedy*, 366 U.S. at 315 n.11, in which the Court cited two court of appeals decisions, *Podea* v. *Acheson*, 179 F.2d 306 (2d Cir. 1950), and *Lee You Fee* v. *Dulles*, 236 F.2d 885, 887 (7th Cir. 1956), rev'd, 355 U.S. 61 (1957). In *Podea*, the court held that the plaintiff could not be deprived of his citizenship on the ground that he had served in the Rumanian army, despite the terms of the applicable statute, since he had been required to remain in Rumania because the State Department had erroneously denied him a passport. In *Lee You Fee*, the court observed in dictum that the government "should not be heard to contend that a plaintiff had been deprived of his citizenship because of the failure of the plaintiff to do something which the officials of the Government had carelessly or willfully prevented his doing." 236 F.2d at 887.[17]

Both *Podea* and the dictum in *Lee You Fee* concerned United States citizens who allegedly had forfeited their citizenship as a result of erroneous actions by government officials. Neither decision mentioned the principle of estoppel. However, the Court in *Montana* v. *Kennedy* cited those decisions in connection with its comment that "we need not stop to inquire whether, as some lower courts have held, there may be circumstances in which the United States is estopped to deny citizenship because of the conduct of its officials." 366 U.S. at 315. The Court concluded that the conduct at issue in *Montana*—an

[17] The court in *Lee You Fee* cited its earlier holding in *Lee Wing Hong* v. *Dulles*, 214 F.2d 753 (7th Cir. 1954), that an individual did not lose his citizenship through failure to establish residence in the United States prior to his sixteenth birthday when that failure resulted from erroneous denial of a passport by government officers.

official's erroneous advice to petitioner's mother that she could not travel to the United States because she was pregnant—fell "far short of misconduct such as might prevent the United States from relying on petitioner's foreign birth." *Id.* at 314-315.

Subsequently, in *INS* v. *Hibi*, 414 U.S. at 8, and *Schweiker* v. *Hansen*, 450 U.S. at 788, the Court characterized *Montana* v. *Kennedy* as leaving open the question whether "affirmative misconduct" on the part of the government might estop it from denying citizenship. However, in both *Hibi* and *Hansen* the Court again concluded that the conduct before it—failure to publicize certain rights to naturalization and to have a naturalization representative present in the Philippines for a period of time (*Hibi*) and erroneous advice concerning availability of social security benefits and failure to advise an individual to file a written application for benefits (*Hansen*)—clearly did not amount to affirmative misconduct, so that there could be no estoppel in any event. In *INS* v. *Miranda*, slip op. 3, the Court stated that the court of appeals was correct in considering initially whether there had been a showing of affirmative misconduct. However, the Court once again concluded that the conduct at issue (delay in processing a visa petition) did not constitute affirmative misconduct and that it therefore was not required to decide whether affirmative misconduct would estop the government from enforcing the immigration laws (slip op. 5).

2. In our view there should be no "affirmative misconduct" exception to the doctrine that the government may not be equitably estopped. As we explained at pages 20-25, *supra*, the doctrine is designed to protect the federal government from the consequences of error or misconduct by its representatives. In par-

ticular, the doctrine ensures that the actions of Executive Branch employees do not have the effect of overriding Congress's will. Estoppel of the federal government undermines these purposes whether a government representative's actions are merely negligent or rise to some unspecified higher level of affirmative misconduct. In fact, it could be contended that the more egregious the conduct of a government employee, the less justification there is for estopping the government. If an employee engages in serious misconduct, it is clear that the agency could not have intended to allow him to bind the government. It seems anomalous for courts to hold that agencies are bound by the actions of their representatives in those situations—and only those situations—in which there can be no doubt that the responsible agency officials did not approve (and would never have approved) the representatives' actions.

The "affirmative misconduct" exception, as it has been embraced and applied by the lower courts, has proven less than successful. There is no generally accepted standard for what constitutes affirmative misconduct, and courts have expressed confusion about the meaning of the term. See *Schweiker* v. *Hansen*, 450 U.S. at 792 (Marshall, J., dissenting). Perhaps the most troublesome problem is that the term "affirmative misconduct" sounds flexible enough to encompass a wide variety of actions. This Court's decisions seem to indicate that misconduct must be quite serious before it would be sufficient to estop the government. However, as in *Hibi*, *Hansen* and *Miranda*, a court that seeks to shift a loss from a seemingly sympathetic private party to the federal government may label as "affirmative misconduct" actions that appear to be merely negligent or even ac-

tions that are in no way wrongful. Like the court of appeals in this case (see Pet. App. 16a-21a), the lower courts may conclude that affirmative misconduct exists because the facts of the case at hand can be distinguished in some manner from the facts of the cases in which this Court has declined to find affirmative misconduct.

In sum, we believe that the "affirmative misconduct" exception, which has been nourished in part by dictum in this Court's decisions, has proven unsatisfactory and unworkable in practice. It is inconsistent with the theoretical underpinnings of the general rule against estoppel of the federal government, and it has generated needless litigation and incorrect decisions. If the Court chooses not to disclaim the "affirmative misconduct" concept entirely, we urge that it at least emphasize the very limited nature of such an exception in view of the significant public policy concerns weighing against estoppel of the government.[18]

3. If the Court were to apply an "affirmative misconduct" exception to the general rule that the government may not be equitably estopped, the facts of this case clearly would not fit such an exception. The court of appeals characterized Travelers as having engaged in affirmative misconduct because its Medicare Manager erroneously advised CHS that the amounts it claimed for CETA salaries and fringe

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[18] In addition to stressing the requirement that a party comply strictly with the traditional standards for estoppel in private litigation, it would be appropriate to emphasize that a finding of affirmative misconduct may not be based on mere negligence in rendering erroneous advice or on an agency's silence or acquiescence in the face of wrongful actions by the party asserting estoppel.

benefits were allowable and because it failed from 1975 to 1977 to consult HCFA about the proper treatment of CETA funds. Pet. App. 15a. But such actions and omissions do not reach the level of "affirmative misconduct." At worse, they amount to negligence. The district court concluded (*id.* at 46a) that the intermediary's actions did not amount to "willful or wanton misconduct," but at most constituted a mistake in judgment.[19]

The conduct in this case is essentially indistinguishable from conduct involved in prior decisions in which this Court has declined to estop the government. In

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[19] It is worth noting that when Congress enacted the Federal Tort Claims Act, it expressly exempted the United States from "[a]ny claim arising out of," inter alia, "misrepresentation" or "deceit." 28 U.S.C. 2680(h).

The court of appeals placed considerable weight on its conclusion that the intermediary failed to carry out what the court referred to as a "legally binding procedure"—consultation with HCFA on matters not settled by statute or regulation (Pet. App. 15a-16a). The Medicare statute, 42 U.S.C. (Supp. V) 1395h(a), states that agreements between the Secretary and intermediaries may provide that the intermediary will serve as a channel of communication between providers and the Secretary, and the agreement between Travelers and the Secretary did contain such a provision. See Br. in Opp. 5. However, there is no indication that Congress intended to impose a duty that would be enforceable by providers (as opposed to the Secretary) in individual instances or that could operate to estop the Secretary from recovering overpayments made to providers. Cf. *Schweiker* v. *Hansen*, 450 U.S. at 789-790; *United States* v. *Caceres*, 440 U.S. 741, 755-756 (1979). Indeed, the Medicare statute appears to indicate that the Secretary herself could not hold an intermediary liable for payments it certifies in the absence of gross negligence or intent to defraud the United States. See 42 U.S.C. (Supp. V) 1395h(g).

FCIC v. *Merrill*, *supra*, a government agent incorrectly informed a wheat farmer that his crop would be federally insured, although applicable regulations clearly provided that the crop was not insurable. In *Schweiker* v. *Hansen*, *supra*, a Social Security claims representative incorrectly informed a claimant that she did not qualify for insurance benefits under 42 U.S.C. (& Supp. V) 402(g) and failed to advise her that she should file a written application for benefits, although instructions in the Social Security Claims Manual indicated that claims representatives should give such advice. The Court in *Hansen* concluded that the government representative's erroneous advice and failure to take steps to discover correct information fell " 'far short' of conduct which would raise a serious question whether [the government] is estopped from insisting upon compliance with [a] valid regulation." *Schweiker* v. *Hansen*, 450 U.S. at 790, quoting *Montana* v. *Kennedy*, 366 U.S. at 314.[20] *Hansen* and *Merrill* compel the conclusion that the intermediary's conduct in this case—rendering erroneous advice and failing to consult HCFA about that advice from 1975 to 1977—does not constitute affirmative misconduct that would warrant estopping the Secretary from performing her statutory obligation to recover Medicare overpayments from CHS.

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[20] See also, *e.g.*, *Automobile Club* v. *Commissioner*, 353 U.S. at 183 (erroneous interpretation of tax law by IRS Commissioner does not estop him from applying a subsequent correct ruling retroactively); *United States* v. *San Francisco*, 310 U.S. at 31-32 (administrative interpretation by Interior Department was not a bar to enforcement of the provisions of the Raker Act); *Wisconsin C. R.R.* v. *United States*, 164 U.S. 190, 212 (1896) (overpayment of funds in derogation of statute was not a bar to the government's action to recover those funds).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 83-56

In the Supreme Court of the United States

October Term, 1983

MARGARET M. HECKLER, Secretary of Health and Human Services,
Petitioner,
v.
COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., a non-profit corporation, ADA WERNER, an individual, FRANK E. WERNER, an individual and SHIRLEY SORGER, an individual,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

May the doctrine of equitable estoppel be applied against the Secretary of the Department of Health and Human Services where the Secretary's agent, within the course and scope of his authority, acted with affirmative misconduct which misconduct induced detrimental reliance on the part of the party seeking the estoppel or where it would be manifestly unjust to sanction the Government's misconduct.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the Travelers Insurance Companies was an appellee in the Court of Appeals.

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STATUTES AND REGULATIONS

No. 83-56

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER,
Secretary of Health and Human Services,
Petitioner,
v.
COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., a non-profit corporation, ADA WERNER, an individual, FRANK E. WERNER, an individual and SHIRLEY SORGER, an individual,
Respondents.

BRIEF FOR RESPONDENTS

Respondents respectfully request that this Court affirm the decision of the United States Court of Appeals for the Third Circuit in this case. That decision is recorded at 698 F.2d 615 and Appendix A, pp. 1a-33a of the Petition.

STATUTES AND REGULATIONS INVOLVED

The only statute or regulation which the case involves not previously set forth by petitioner or in respondents' Brief in Opposition to the Petition is set forth herein.

The Comprehensive Employment and Training Act of 1973 ("CETA"), P.L. 93-203, 87 Stat. 839, 29 U.S.C. §801 *et seq.*, provided in the original Act as follows:

TITLE II—PUBLIC EMPLOYMENT PROGRAMS

Statement of Purpose

Sec. 201. It is the purpose of this title to provide unemployed and underemployed persons with transitional employment in jobs providing needed public services in areas of substantial unemployment and, whenever feasible, related training and manpower services to enable such persons to move into employment or training not supported under this title.

* * *

Applications

Sec. 205. (a) Financial assistance under this title may be provided by the Secretary for any fiscal year only pursuant to an application which is submitted by an eligible applicant and which is approved by the Secretary in accordance with the provisions of this title. Any such application shall set forth a public service employment program designed to provide employment, in jobs providing needed public services, for persons residing in areas of substantial unemployment who have been unemployed for at least thirty days and, where appropriate, training and manpower services related to such employment which are otherwise unavailable, and to enable such persons to move into employment or training not supported under this title.

* * *

(c) An application for financial assistance for a public service employment program under this title shall include provisions setting forth—

* * *

(3) assurances that only persons residing within the areas of substantial unemployment qualifying for

assistance will be hired to fill jobs created under this title, and that the public services provided by such jobs shall, to the extent feasible, be designed to benefit the residents of such areas;

* * *

(6) assurances that, to the extent feasible, public service jobs shall be provided in occupational fields which are most likely to expand within the public or private sector as the unemployment rate recedes;

* * *

(11) description of unmet public service needs and a statement of priorities among such needs;

* * *

(25) assurances that jobs funded under this title are in addition to those that would be funded by the sponsor in the absence of assistance under this Act;

* * *

TITLE VI—GENERAL PROVISIONS

Definitions

Sec. 601. (a) As used in this Act, the term—

* * *

(7) "Public service" includes, but is not limited to, work in such fields as . . . health care, . . . and other fields of human betterment and community improvement.

The Medicare Provider Reimbursement Manual, HIM-15, Pt. I, §612.2, reproduced in Medicare & Medicaid Guide (CCH) ¶5461 (Aug 1968) provides:

612.2 *Seed Money Grants.*—Grants designated for the development of new health care agencies or for expansion of services of established agencies are generally referred to as "seed money" grants. "Seed money" grants are not deducted from costs in computing allowable costs. These grants are usually made

to cover specific operating costs or groups of costs for services for a stated period of time. During this time, the provider will develop sufficient patient caseloads to enable continued self-sustaining operation with funds received from Medicare reimbursement as well as from funds received from other patients or other third-party payers. (p. 6-6)

STATEMENT OF THE CASE

The Opinion of the Court of Appeals for the Third Circuit sets forth the facts, but respondents would like to emphasize the following:[1]

From the inception of the Medicare Program in 1966 until late spring of 1975, Community Health Services of Crawford County, Inc. ("CHS")[2] was a small home health care provider serving a portion of Crawford County, Pennsylvania. In the spring of 1975, CHS depended upon volunteer workers and only had five employees and a budget of about $53,000. (PRRB Record 0097-0100) At that time, CHS's sources of funds included Medicare, Medical Assistance, charities, such as United Way, and the County Commissioners. (PRRB Record 0099) Because of its charitable nature and sources of its funding, CHS could be classified as a quasi-public agency.

It was this quasi-public agency posture which caused the County Commissioners and CHS to seek ways to expand services to needy residents of the County. The County Commissioners were concerned that CHS only provided services in the western portion of the County and the residents living in the eastern portion of the County

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[1]Reference to the Third Circuit Joint Appendix is designated C.A. App., reference to Petition Appendix is designated Pet. App., and reference to the Provider Reimbursement Review Board Record is designated PRRB Record.

[2]CHS has no parent company, subsidiaries or affiliates.

were not getting the benefit of services supported by their tax dollars. (PRRB Record 0097-0098)

Crawford County is the ninth largest county in Pennsylvania in land area and has a population of approximately 81,000 persons. The rural nature of Crawford County, the disproportionate number of elderly people, the lack of job opportunities, the large welfare load, and the shortage of adequate medical services gave a sense of urgency to the problem faced by the County Commissioner and CHS. (PRRB Record 0093-0095)

At the time John Wallach, CHS' Executive Director, was hired in May 1975, CETA funds were being made available pursuant to Public Law 93-203, 87 Stat. 839, 29 U.S.C. §801 *et seq.* Positions with CHS had been allocated under the authority of the County Commissioners for the development of new services and an expansion of the area serviced by CHS. (PRRB Record 0100-0101) People hired to fill CETA slots were hired under the public service provisions of CETA. See, for example, the document at PRRB Record 0320 entitled "Public Service Employment Program—Agent Agreement."

By using CETA employees for public service and preparing the cost accounting reports as directed by the Secretary's Intermediary, Travelers, CHS was able to expand the services it provided throughout the County. CHS was also able to introduce programs and services which had not previously been provided. This expansion of services is described in some detail in the testimony of John Wallach at PRRB Record 0101-0147. The number of units of service (visits) rose from approximately 4,000 to over 81,000 during the three years which are in dispute in this case. (PRRB Record 0128) CHS' budget also rose to approximately $900,000 from the previously mentioned $53,000.

(PRRB Record 0134) This expansion was possible because of the directions received from Travelers that the CETA payments were to be treated as "seed money" and would not reduce CHS' reasonable costs to be reimbursed by Medicare. These directions permitted CHS to obtain duplicate reimbursement for its CETA employees thereby providing additional funds to expand the non-profit services provided to the residents of Crawford County.

There is no dispute of fact that it was the duty of the Secretary's fiscal intermediary, Travelers, and its employee, Michael Reeves, to deal with CHS and that they were acting within the scope of their authority at all relevant times.

There is no dispute of fact that the relationship between CHS and Travelers was close and ongoing and that the operations of the provider required prompt and reliable decisions through the Secretary's agent. The provider had a need to know and without delay.

There is no dispute of fact that CHS' charges for services rendered under Medicare were "reasonable", normal charges and the reduction in those charges sought by the Secretary through recoupment would lessen ordinary Medicare payments by reason of the CETA payments to CHS. The denial of recoupment to the Secretary would not result in any actual loss to Medicare.

There is no dispute of fact that the Secretary's agent was fully aware of the fact that CHS intended to use duplicate payments as seed money for the expansion of non-profit public services.

There is no dispute of fact that CHS treated income that duplicated payments to CHS' employees as seed money and expended that money for the expansion of

public non-profit services by CHS in furtherance of the intent of Congress.

There is no dispute of fact that CHS did not retain the duplicate payment money. Statements in the Secretary's brief indicating that CHS retained such payments are unfounded, false and misleading.

There is no dispute of fact that CHS viewed its dealings with the Secretary's agent as a commitment or agreement on the part of the Secretary and, except for that belief, would not have undertaken the expansion of CHS' non-profit public services by hiring additional personnel which CHS otherwise could not have afforded to do.

There is no dispute of fact that essentially all of CHS' income is from federal, state and local governmental agencies with only a minor portion of CHS' income received from other sources; and those, such as United Way, are charitable organizations.

There is no dispute of fact that CHS cannot be returned to its condition prior to the action of the Secretary's agent.

There is no dispute of fact that CHS and the public, including the individual respondents, will be injured unless the Secretary is estopped.

There is no dispute of fact that the Secretary has recourse against Travelers.

There is no dispute of fact that the money sought by the Secretary is a minor amount of Medicare funds.

CHS' Wallach testified that he asked Travelers' Medicare Manager, Michael Reeves, on at least five occasions how CHS was supposed to treat the CETA payments for cost accounting purposes. The first time was prior to sub-

mitting any cost information to Travelers. Wallach was concerned with correctly calculating CHS' reimbursable costs but did not know how to calculate the costs and sought direction from Travelers. Prior to submitting any cost data on CETA employees, Travelers' Reeves instructed Wallach that the CETA payments did not have to be offset against CHS' reimbursable costs because they qualified as seed money. Travelers then approved CHS' cost reports which CHS prepared as directed by Reeves. The Secretary's regulations required Travelers to provide CHS with written notice reflecting Travelers' determination of the amount of program reimbursement and Reeves testified that that was done. 42 C.F.R. §405.1803. Thus, Travelers was obligated to provide written advice to CHS for the Cost Years in question and, pursuant to those procedures, approved CHS' cost reports prepared according to the "Reeves" procedure. (PRRB Record 0103-0107, 0185-0189, 0196-0197)

Travelers first notified CHS in October 1977, the last month of CHS' 1977 Cost Year, that there was a problem with the cost accounting procedure directed by Reeves. This was approximately two and one-half years after Wallach's first inquiry and Reeves' first response and after CHS had used the additional income to expand the services that it provided to the residents of Crawford County. The additional income was used to start-up various governmental approved programs until the programs became self-sustaining through the Medicare cost reimbursement procedures. The CETA payments were the only means for CHS, a non-profit agency, to accomplish this expansion. (PRRB Record 0105-0108, 0185-0189)

Reeves testified that he knew of no official policy concerning CETA payments at the time he was first questioned by CHS. (PRRB Record 0185-0186, 0189-0193, 0197-

0198) In hindsight, Reeves was still unable to identify any policy during this time period. (PRRB Record 0198-0199) There was no other testimony at any time concerning petitioner's policy.

Reeves further testified that the procedure, which intermediaries were to follow to obtain answers to questions for which there was no guidance, was to pass the questions along to the regional office of the Bureau of Health Insurance (an agency of the Secretary now Health Care Financing Administration). (PRRB Record 0179)

Reeves did not pass along CHS' repeated inquiries for over two years yet advised CHS during this time not to offset the CETA payments.

Throughout all of the proceedings in this case, there has never been an allegation or even an innuendo that CHS used the additional funds for wrongful purposes or purposes not intended by Congress.

Because of its decision on the estoppel issue, the Third Circuit did not reach any of the other issues presented by respondents in their appeal from the judgment of the District Court.

SUMMARY OF THE ARGUMENT

The decision of the Court of Appeals for the Third Circuit should be affirmed. The undisputed facts established unconscionable conduct on the part of the Secretary and Travelers which, unless estopped, would have imposed an undeserved injury on respondents and the public as well. Respondents at all times acted in good faith in seeking and following the directions provided by Travelers as the Secretary's agent and respondents should not be punished for having justifiably relied on and followed those directions. The public and not CHS gained from the Medicare payments.

Decisions in other cases throughout the land reflect a consensus that at least in exceptional circumstances, the doctrine of estoppel should be available against the government.

The ancient concept of governmental immunity from wrongdoing is outmoded and unacceptable in our society.

In deciding upon a policy applicable throughout the land, the judicial branch must have the last word as to the law rather than administrative agencies and where misleading or wrongful government conduct has induced reasonable detrimental reliance, the government should be estopped like any other party unless the government can show exceptional circumstances which would require a Court to withhold equitable relief.

ARGUMENT

THE SECRETARY OF HEALTH AND HUMAN SERVICES MAY BE ESTOPPED BECAUSE HER AUTHORIZED AGENT REPEATEDLY AND KNOWINGLY VIOLATED ITS STATUTORY DUTY TO COMMUNICATE QUESTIONS FROM THE PROVIDER TO THE SECRETARY ASKING FOR GUIDANCE CHOOSING INSTEAD TO ANSWER QUESTIONS FOR WHICH THERE WAS NO GUIDANCE AND TO INDUCE THE PROVIDER TO RELY UPON THE ANSWERS TO ITS DETRIMENT

The essence of the Secretary's position in this case is stated succinctly by Raoul Berger in his article, *Estoppel Against the Government*, 21 U. of Chi. L. Rev. 680 at 707 (1954):

> The claim of the government to an immunity from estoppel is in fact a claim to exemption from the requirements of morals and justice.

This case presents the Court with a policy question as to whether government agencies must act responsibly in dealing with the public or whether there is no limit whatsoever on the government's power to injure and damage members of the public.

A. The Third Circuit Decision Correctly States the Law and Should be Affirmed

> Since time immemorial it has been argued that "The King can do no wrong;" therefore, his subjects can neither complain of, nor be indemnified for, the "wrongs" of the King nor for the wrongs of the King's agents. In a different context, we are now asked to affirm a somewhat similarly archaic concept in favor of the United States government, regardless of its effect on innocent persons. . . . In effect, the government seems to argue that "We, just like the King and his agents, can do no wrong, regardless of the grievous consequences we cause innocent people."

Community Health Services etc. v. Califano, 698 F.2d 615 at 616-617; Pet. App. at p. 2a.

The Third Circuit recognized the significance of the Secretary's position in holding that the government's authority to avoid the consequences of its actions is not unlimited and that limits to such abuse of authority exist. To have decided this case in favor of the Secretary, the Third Circuit would have had to grant the Secretary unbridled authority to disavow any actions taken by her or her agents without regard of the consequences to the public. This would have been contrary to the philosophy of this country and our concept of a responsive, responsible government. Clearly, the Third Circuit's decision is proper and within the system of checks and balances established in the Constitution.

The principal recent cases considered and distinguished by the Third Circuit are *INS v. Miranda*, 459 U.S. 14 (1982); *Schweiker v. Hansen*, 450 U.S. 785 (1981), *reh. denied*, 451 U.S. 1032 (1981); *INS v. Hibi*, 414 U.S. 5 (1973),*reh. denied*, 414 U.S. 1104 (1973); *Montana v. Kennedy*, 366 U.S. 308 (1961); and *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380 (1947). CHS believes the Third Circuit's analysis of each of the cases reflects an accurate and correct statement of the law. Moreover, CHS believes that while further justification for the Third Circuit's position on each of the cases is unnecessary, such comments would lead to a better understanding of the decision.

Federal Crop Insurance Corp. v. Merrill, *supra*, turns on a question of constructive knowledge of the regulations. There appears to be no dispute in the clarity of the regulations barring the insurance on spring wheat which is reseeded on winter wheat acreage. The regulations were incorporated by reference into the application for insurance. Additionally, the agent for the government corporation was ignorant of that particular provision of the regulations.

In this case, neither circumstance is present. The testimony of the agent, Reeves, clearly establishes his knowledge of the requirement to act as a channel of communication between providers and the Secretary. Reeves testified that there was no guidance at all in 1975 when CHS first asked the question. In hindsight, at the time of the PRRB Hearing, Reeves still could not identify any guidance. As the evidence demonstrates, the regulations and guidelines were so unclear that Reeves and Travelers were unable to resolve the question, the Bureau of Health Insurance (now Health Care Financing Administration) regional office was unable to answer the question, and the central office of the

Health Care Financing Administration had to go outside the Department to the Department of Labor in order to reach a conclusion that CETA payments should be offset. (PRRB Record at 0275-0276) Thus, it seems difficult to believe that CHS could have gone to any of the Secretary's guidelines or regulations to determine that CETA payments should not be offset. Further, the Secretary fails to cite any specific guidelines or regulations that deal with CETA payments in connection with Medicare reimbursement and CHS does not concede that the Secretary was and is entitled to offset CETA payments under the cost accounting procedure.

Montana v. Kennedy, supra, was distinguished because of CHS' inability to assert its rights in any other way than by using its channel of communications. There were no guidelines, regulations, etc. The Third Circuit pointed out that CHS made inquiry into the only governmental source of information available. Moreover, the Secretary seems to ignore the testimony of Reeves when he said there was no guidance at all from the Secretary on the treatment of CETA payments. There was no source of information except through CHS' channel of communication, Travelers. The court in *Montana v. Kennedy, supra*, refused to inquire whether the government could be estopped reasoning that the advice of the American Consular Officer fell far short of misconduct that might estop the government. *Montana v. Kennedy* is also distinguishable because of the time period involved and the number of inquiries made by CHS. CHS was waving a flag in front of the Secretary's agent who was advising CHS over a two year period of time that the method of not offsetting the CETA payments was proper. CHS made inquiries, submitted its cost reports in accordance with the directions it received and had those cost reports approved.

The Third Circuit distinguished *INS v. Hibi, supra*, because the government did not make it's representative available and did not publish the rights afforded under the Act in question and thus no advice at all was given, nor, apparently was any found to be required. Additionally, as in *Federal Crop Insurance Corp. v. Merrill*, reading the law or the regulations would have made it clear that the time for applying for citizenship under the particular act involved was limited. In this case, the Third Circuit reasoned that the Secretary made her agent available for consultation and CHS consulted the agent and was given the advice on which CHS relied. Moreover, reading the law or regulations would not have answered CHS' question. Thus, *INS v. Hibi* is also distinguishable on these grounds from the circumstances faced by CHS.

The Third Circuit readily distinguished *Schweiker v. Hansen* because the agent did not cause the respondent to take action or fail to take action. Additionally, the respondent was able to correct the situation at any time. Such is not the case with CHS. CHS obtained approval prior to its actions for which the Secretary now seeks to penalize CHS and CHS can not be returned to it's prior condition. Thus, if anything, the Secretary waived her right to assert a claim of overpayment up to the time of notice to CHS of her changed position.

Another ground for finding there was no affirmative misconduct in *Schweiker v. Hansen* was that the majority in the Court of Appeals agreed that the government agent's conduct was less than affirmative misconduct. This agreement is acknowledged by this Court at 450 U.S. at 789. Thus, if the standard is affirmative misconduct, *Schweiker v. Hansen* did not rise to that threshold. Here, the Third Circuit clearly found affirmative misconduct. Thus, a different theory is presented. There is no speculation as to

what Reeves thought. He testified that he knew there was no guidance and that he knew that the procedure was to make inquiry of the Health Care Financing Administration to determine the Secretary's position. It is equally clear that he did not follow this procedure for a period of time in excess of two years during which CHS used the seemingly extra money to provide additional needed services, the cost of which cannot now be recouped by CHS to repay money allegedly owed to the Secretary. Neither Travelers nor the Secretary has ever given any explanation for the delay in obtaining a response from the Health Care Financing Administration.

INS v. *Miranda*, *supra*, was distinguished by the Third Circuit on the grounds that in *Miranda* the evidence did not establish that the government failed to fulfill its duty whereas here Travelers' duty was clear and the evidence establishes that Travelers knowingly failed to perform that duty. Reeves' testimony is unequivocal. He knew of the requirement to act as a channel of communication between the provider and the Secretary for questions raised by the provider. He knew that the Secretary had not issued any guidance as to the treatment of CETA payments. And, he failed to communicate CHS' question to the Secretary for a period of time in excess of two years. It is also undisputed that in the absence of any guidance from the Secretary, Reeves provided the guidance that evolved into the dispute in this case. *Miranda* is further distinguishable because the estoppel question was not raised until the case was on appeal and the parties were unable to develop any factual record on the issue. Thus, the question of the reasonableness of the 18 month processing time by INS was unclear. No evidence was produced because it was not in issue prior to appeal. Here, however, the Secretary, through Travelers, had the opportunity to fully

develop the record and explain the delay but failed to do so.

The dissenting opinion from the Third Circuit adds little to an understanding of this case. The majority points out the shortcomings of the dissenting opinion. Additionally, the majority's discussion of the five recent estoppel cases before this Court demonstrates that this case is very different and clearly establishes the inequitable acts and the affirmative misconduct of the Secretary through her agent.

Even the dissent's argument concerning substantive entitlement misses the mark. CHS is entitled to claim as costs for purposes of its cost accounting the salaries paid to everyone on its payroll, including the CETA employees on the payroll. The only difference in the position taken by the Secretary is that before the final sum for reimbursement is established, the CETA payments must be deducted. Thus, CHS is substantively entitled to claim the costs but must reduce the figure under the Secretary's procedure on the theory that the CETA payments are restricted rather than general purpose grants. (PRRB Record 0276) Parenthetically, it would seem very clear that a donor would not likely make a restrictive gift if he or she knew that to do so would reduce payments of other income due from a governmental agency. In reality there is no basis for the dissent's statement concerning substantive entitlement. Additionally, the dissent completely ignores the seed money exception to restricted grants that even the Secretary acknowledges as a valid exception to her claim to receive the benefit of others' gifts. Neither the majority nor the dissent reached this issue. Thus, the dissent's substantive entitlement theory seems to have little merit.

In the attempt to couple the archaic "raid on the public treasury" concept with the substantive entitlement the-

ory, the dissent fails to address the Trust Fund or insurance fund established under the Medicare Act. This is not a raid on the public treasury. If the government were a private insurance company, this would probably be characterized as a cost of doing business. While Congress may eventually have to appropriate funds from the general revenues to shore up the Trust Fund, such action has not yet been taken nor could it without changes to the law. Thus, any reference to a raid on the public treasury is totally inaccurate and overstates what is here involved.

The practical effect of overturning the Third Circuit's decision in this case would be unconscionable. First, it would prolong this litigation disproportionate to the sum of money involved because the Third Circuit would then have to consider each of the remaining issues not addressed because of its decision regarding estoppel. Second, overturning the estoppel issue could defeat the Congressional purpose of permitting the Secretary to administer the program through intermediaries. The Secretary's position that "you cannot trust the government" would be clearly established and it seems unlikely that any provider would entrust a serious matter to an intermediary. The risk to the provider would be too great. Consequently, the Secretary would be forced to replace intermediaries with her own people contrary to the intent of Congress expressed in the Medicare Act authorizing the Secretary to manage this program with intermediaries.

Finally, overturning the Third Circuit's decision would injure CHS, the individual respondents and the public which CHS serves and create a severe problem for the Secretary, the individual respondents, the public and CHS. As a non-profit agency engaged in public service for the needy, CHS is reimbursed for specific services and the funds received by CHS are not intended to lessen pay-

ments by the Secretary for normal charges. Similarly, charitable funds are not intended for the government. As for the individuals served by CHS, the failure to receive services can be a matter of life and death. See pages 21-22, *infra*.

In conclusion, respondents believe that the Third Circuit correctly decided this case and should be affirmed.

B. Respondents Should not be Punished for Outrageous Conduct of the Government and/or Travelers

The Secretary's brief is built upon the myriad of regulations most of which are inapplicable in this case because of the single issue of government estoppel presently before the Court. For example, the question of whether the CETA payments were properly seed money was not reached by the Third Circuit and thus the Secretary's discussion of this issue is superfluous and only tends to confuse the question which this Court must answer.

With respect to the Secretary's many references to regulations, the sanctity of those regulations and of the requirement for blind adherence to them, nowhere does the Secretary suggest or even hint that the regulations may be confusing, ambiguous or just plain wrong. Yet on the very question involved in this litigation, the regional office of the Health Care Financing Administration was unable to answer the question concerning the cost accounting treatment of CETA payments. The regional office had to contact its central office who in turn could not answer the question without going outside the Department of Health and Human Services to the Department of Labor. This merely underscores CHS' need for assistance in interpreting and understanding the correct cost accounting measures it was to apply when it first received the CETA payments in mid-1975.

In seeking help on this matter, CHS followed the mandated procedure of going to Travelers for the correct cost accounting treatment. CHS was fully entitled to expect that Travelers, if it had received no guidance from the Secretary, would obtain such guidance thereby serving as a channel of communications. As the undisputed facts show, Travelers did not act as a channel of communications but directed CHS not to offset the CETA payments for a period in excess of two years. Travelers' decision to follow the regulations and its contract and ask for the guidance from the Secretary came two years too late.

There is an additional reason for viewing Travelers' conduct with suspicion. Even assuming that the Secretary is correct in stating that CHS could have gone direct to the Health Care Financing Administration, Travelers undertook to provide the answer and for that reason was bound to use due care. There is no question that Travelers failed to perform this duty properly. The decisons at each level have so held. For example, the District Court held:

> "In this case there is no question that Michael Reeves gave incorrect advice to the provider and approved cost reports reflecting that erroneous advice." (Pet. App. 46a)

If the Secretary feels compelled to blindly and rigidly enforce her regulations, then she should start with Travelers because Travelers knowingly and repeatedly violated statutory, procedural and contractual requirements. At a minimum Travelers was grossly negligent in not making inquiry to the Secretary which would give the Secretary a contractual remedy against Travelers. In reality, however, Travelers' conduct was much more egregious. Reeves knew the procedures, knew there was no guidance from the Secretary but did not report this to CHS. Instead, he told CHS what to do with the full realization that CHS

intended to rely on the response. Reeves then compounded this by approving CHS' cost reports for over two years. Query, if Reeves'/Travelers' actions were wrong, should they be permitted to deliberately violate the law and then use CHS as a scapegoat?

Here, the culpability of Travelers seems obvious yet the Secretary has made no attempt to enforce the indemnity provision under its contract with Travelers. Surely that indemnity provision was placed in the intermediary contract to cause the intermediaries to toe the line and give recourse to the secretary. It is unconscionable to hold CHS liable for Travelers' conduct. It violates all standards of equity and fair dealing. The Secretary argues that she must enforce the law against CHS, but ignores enforcing her contract with Travelers. The right to collect from Travelers also negates the argument that a failure to recover from CHS amounts to a raid on the public treasury because there could be no loss if the Secretary enforces the obligation.

Equitable estoppel which is asserted here against the Secretary transcends the Regulation upon which the Secretary relies. To permit the Secretary to avoid the consequences of the conduct of her agent on the grounds that CHS had no right to rely upon Travelers' directions because of the three-year reopening provisions totally ignores the principles of equity and the facts. If estoppel is found proper of what importance is the three year time period? The time limitation could be modified or even eliminated by agreement of the Secretary's agent.

Here, there is no question that CHS had neither actual nor constructive knowledge of any policy or guideline of the Secretary's other than that received from Travelers. As previously described, the regulations and/or guidelines are so unclear that even the Secretary's experts could not read-

ily answer the question. Moreover, the Secretary has not pointed to any guideline, regulation or documentary evidence of record that supports her position that guidelines were available with respect to CETA payments. On the other hand, the undisputed testimony of Reeves is that there was no statement of policy until the end of the period involved herein. (PRRB Record 0179) Further, by examining the letter from the Health Care Financing Administration setting forth the policy at the end of the period in dispute, it seems logical to expect the Secretary to reference any prior policy. No such policy is referenced. In fact, because the letter from the Health Care Financing Administration states that it had to go outside the Department of Health and Human Services to answer the question, the clear implication is that there never was any policy. See Health Care Financing Administration letter dated September 20, 1977. (PRRB Record 0276) It seems likely under this scenario that the Secretary first established the policy in 1977 and is now attempting to apply this policy retroactively against CHS under the guise of reopening within a three-year period.

To permit the Secretary to apply such a new policy retroactively would not only be in violation of the law but, would be manifestly unjust because no new facts were introduced. The circumstances of the CETA payments were fully disclosed in 1975 and remained unchanged throughout the period in dispute. Finally, CHS' right to rely on Travelers' statutory obligation to serve as a channel of communication overcomes the Secretary's three-year reopening argument and clearly focuses the Court's attention on the manifest injustice to CHS.

The consequences of reversing the Third Circuit's decision would be immeasurable. To repay the alleged overpayments, CHS would have to take money from its

deficit funding sources (it cannot obtain it from Medicare) thereby depriving non-Medicare eligible persons of needed services. Even Reeves admitted that if the CETA payments were offset (recoupment permitted) the Medicare reimbursements would be artificially lowered by shifting the cost to individuals not covered by the Medicare Act. (PRRB Record 0204-0205) This would judicially authorize a violation of the Medicare Act 42. U.S.C. §1395X(v)(1)(A)(i). This problem does not occur where the provider is a for-profit agency because profits can be used to repay the overpayment without depriving persons of needed medical services. Thus, it would appear that the Secretary's regulations do not apply with equal force to all providers. There is a significant discrepancy as the regulations are applied to charitable and for-profit agencies.

In the event CHS must repay the alleged overpayment to the Secretary, it may likely find itself without sufficient funds to do so because agencies such as United Way would be unlikely to consent to the use of the charitable contributions provided to CHS. Without any other means of repayment, the Secretary would most likely seek a self-help solution and retain current Medicare payments due to CHS. In this event, the result predicted by the District Court when it entered the Temporary Restraining Order would occur. (C.A. App. 69a-71a) With CHS' doors closed, the Secretary likely would have a major medical crisis on her hands because of the large area of Crawford County which has been declared medically underserved. (PRRB Record 0278-0281) The specific nature of the problems which would occur are well described in the letters enclosed as Exhibit B to Respondent's Motion for Temporary Restraining Order. (C.A. App. 35a-68a)

C. The Court Must Determine Whether Limits Can Be Placed On The Federal Government To Prevent It From Dealing Irresponsibly And From Injuring Others Solely Because It Is The Federal Government

To date, this Court has declined to state directly whether the government can be estopped, and if so, under what circumstances. The five most recent cases in which this Court specifically addresses the estoppel issue have been previously discussed and will not be repeated. In four of the cases, *INS v. Miranda, supra; Schweiker v. Hansen, supra; INS v. Hibi, supra;* and *Montana v. Kennedy, supra,* the Court alluded to but did not reach the question of whether affirmative misconduct in a particular case would estop the government. The theory on which the Third Circuit decided this case was affirmative misconduct but it also refused "to sanction such a manifest injustice occasioned by the Government's own misconduct." (Pet. App. 21a)

1. Can the Government be Estopped?

a. Predicate Cases

The purported rule against estoppel of the government finds its roots in the early case of *Lee v. Munroe,* 11 U.S. (7 Cranch) 366 (1813). In that case, plaintiff sought to estop the government from asserting that a particular communication from the government's agent to plaintiff was gratuitous and not within the sphere of the agent's official duties. Additionally, the case turned on a question of mistake and nothing more. Interestingly, the Court distinguished the question of mistake from fraud opining that where the agent acted fraudulently, the agent may be personally liable to the plaintiff. The case was clearly before the Court on the question of mistake.

While there were several intervening decisions, *Utah Power and Light Co. v. United States*, 243 U.S. 389 (1917), is a case frequently cited for the position that the government cannot be estopped. In *Utah Power*, this Court said that the United States was not bound nor estopped by acts of its agents in entering into an agreement to do or cause to be done something that the law does not permit. The particular holding of the Court in *Utah Power* differs little from *Lee v. Munroe* which is cited in support thereof. The next case or cases which are frequently cited in support of the traditional rule that the government cannot be estopped are *Federal Crop Insurance Corporation v. Merrill, supra; Montana v. Kennedy, supra; INS v. Hibi, supra; Schweiker v. Hansen, supra;* and *INS v. Miranda, supra*, which were discussed in the Third Circuit opinion and earlier in this brief. The most recent of these cases appear to have picked up on an area left open in *Lee v. Munroe*, that of conduct which is more flagrant than mere inadvertance.

The rationale behind the traditional rule of not estopping the government resides in the perception that federal rights would be forfeited without sovereign consent. This rationale has not served to prevent circuit courts of appeal from finding grounds to estop the government where, in many cases, the conduct has been characterized as "affirmative misconduct."

A commentator has stated as to the present permissibility of applying the doctrine of equitable estoppel against the government:

> Over several decades, the federal law on the question of whether the government may be estopped has been evenly shifting from never to sometimes. Until 1981, the movement has been clearly

> in the direction of more often allowing estoppel, although answers to questions of whether particular courts will allow estoppel on particular facts have usually been unclear. The lower courts over two or three decades have appeared to be more liberal in allowing estoppel than the Supreme Court . . . .
>
> . . . How much of the law of lower courts estopping the government is dislodged by the *Hansen* decision is difficult to determine. The Court's summary action, without a fully reasoned opinion, leaves many uncertainties. Yet a good deal of law that the government may be estopped in particular circumstances probably still stands. The long term view of most judges of lower courts—a view adopted even in the face of some Supreme Court authority to the contrary—may be based on understanding that will continue to be felt.
>
> More than the latest Supreme Court pronouncement must be considered, because (a) the law of estopping the government has never been stationary and is unlikely to become so, (b) only a portion of such estoppel law is susceptible to answers in blacks and whites, (c) the Supreme Court's five main opinions on the subject lack consistency, and (d) some recent decisions estopping the government might win approval of the Supreme Court, *for it has never been said that the government may never be estopped.*

K. Davis, Administrative Law Treatise §§ 17.03-04, at 252-253 (1982) ("1982 Ad. Law Supp") (Emphasis added.)

Summarizing his conclusion on the subject, Davis states:

> Courts once commonly asserted flatly that the government may not be estopped: "it is settled that

> estoppel may not be asserted against an agency of the United States government . . ." *Spencer v. Railroad Retirement Board*, 166 F.2d 342, 343 (3rd Cir. 1948). In the five *Hansen* opinions, two in the Supreme Court and three in the Second Circuit, no such statement appears. *The present law probably is that the government may be estopped when justice so requires*, except that in the *Hansen* case, the Supreme Court seemingly failed to discuss the question of whether justice required estoppel of the government.

Id. § 17.01, p. 252 (emphasis added).

The concurring opinion of Judge Newman in the United States Court of Appeals for the Second Circuit in the *Hansen* litigation offers a comprehensive recent survey of the permissibility of applying the doctrine of equitable estoppel against the government. Therein, Judge Newman states:

> While emphatic rejections of estoppel against the Government occasionally appear in passing phrases, see *Dix v. Rollins*, 413 F.2d 711, 716 (8th Cir. 1969); *Udall v. Oelschlaeger*, 389 F.2d 974, 977 (D.C. Cir.) *cert. denied*, 392 U.S. 909 (1968), no court of appeals has ruled that estoppel would be unavailable in all circumstances. On the contrary, no fewer than eight circuits, including this one, have stated that there are some circumstances in which the government will be estopped. *Corniel-Rodriguez v. INS*, 532 F.2d 301 (2nd Cir. 1976); *Walsonavich v. United States*, 335 F.2d 96 (3rd Cir. 1964); *Tuck v. Finch*, 430 F.2d 1075 (4th Cir. 1970); *Simmons v. United States*, 308 F.2d 938, 945 (5th Cir. 1962); *United States v. Fox Lake State Bank*, 366 F.2d 962 (7th Cir. 1966); *United States v. Wharton*, 514 F.2d 406 (9th Cir. 1979); *Massaglia v. Commissioner*, 286 F.2d 258, 262 (10th Cir. 1961) (dictum); *Semann v. Mumford*, 335 F.2d 704,

706 (D.C. Cir. 1964). The principle is particularly well established in this Circuit. See *Corniel-Rodriguez, supra*, *Miller v. United States*, 500 F.2d 1007 (2nd Cir. 1974); *Podea v. Acheson*, 179 F.2d 306 (2nd Cir. 1950) (conclusion that plaintiff's waiver of citizenship was not binding for reason of duress supported by erroneous nature of government advice to plaintiff); *Tonkonogy v. United States*, 417 F. Supp. 78 (S.D.N.Y. 1976). These decisions have not purported to evolve a standard for determining when the Government is estopped. That task requires further analysis of the cases, those that have upheld an estoppel and those that have not.

Hansen v. Harris, 619 F.2d 942, 958-959 (2nd Cir. 1980), *rev'd*, 450 U.S. 785 (1981), *reh. denied*, 451 U.S. 1032 (1981) (Newman, J., concurring) (footnotes omitted).

Still other circuit cases support the position that under some circumstances the government can be estopped. *Eichelberger v. Commissioner of Internal Revenue*, 88 F.2d 874 (5th Cir. 1937) (government precluded from changing its position); *Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1970) (government estopped to deny plaintiffs' priority for an oil and gas lease because of misleading assurances); *Man Loading and Management Associates v. United States*, 461 F.2d 1299 (Ct. Cl. 1972) (government estopped from disavowing promise regarding renewal of contract); *Sylvania Electric Products, Inc. v. United States*, 458 F.2d 994 (Ct. Cl. 1972) (government estopped from disavowing oral understanding reached at bidders' conference); *U.S. v. 31.43 Acres of Land*, 547 F.2d 479 (9th Cir. 1976) (equitable estoppel analysis applied to direct assurances entering into construction contracts would increase value of remaining lands); *California Pacific Bank v. Small Business Administration*, 557 F.2d 218 (9th Cir. 1977) (estoppel

should be available where justice and fair play require it); *Becker's Motor Transportation, Inc. v. Department of Treasury*, 632 F.2d 242 (3rd Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) (IRS estopped from collecting prepetition interest from the debtor's estate); *Mendoza-Hernandez v. INS*, 664 F.2d 635 (7th Cir. 1981) (affirmative misconduct which actually prejudiced alien would estop the government from denying relief requested); *Yang v. INS*, 574 F.2d 171 (3d Cir. 1978) (proof of affirmative misconduct on part of INS would entitle petitioner to relief); *Portman v. United States*, 674 F.2d 1155 (7th Cir. 1982) (estoppel may be available against the government); *Dana Corp. v. United States*, 200 Ct. Cl. 200, 470 F.2d 1032 (1972) (government estopped from denying authority of contracting officer's authority); *United States v. Georgia-Pacific Co.*, 421 F.2d 92 (9th Cir. 1970) (government was not immune from estoppel where the government was seeking specific performance of a contract); *Schuster v. Commissioner of Internal Revenue*, 312 F.2d 311 (9th Cir. 1962) (government estopped to recover a tax deficiency where property from an estate was distributed in reliance upon a revenue ruling); *Walsonavich v. United States*, 335 F.2d 96 (3d Cir. 1964) (government estopped from asserting statute of limitations); *United States v. Fox Lake State Bank*, 366 F.2d 962 (7th Cir. 1966) (government estopped from bringing an action under the Civil False Claims Act); *United States v. LAZY FC Ranch*, 481 F.2d 986 (9th Cir. 1973) (government estopped where government's wrongful conduct threatens to work a serious injustice); *Corniel-Rodriquez v. INS*, 532 F.2d 301 (2d Cir. 1976) (government estopped from deporting alien because Consul failed to warn of forfeiture if alien married before being admitted to the United States).

b. *Considerations for Estopping the Government*

What may be termed generally as wrongful conduct on the part of the government seems to be the focus in all of the cases in which a court has determined that the government may be or is estopped. On the other hand, in cases which find that estoppel is inappropriate, the focus seems to be founded upon Constitutional principles. The emphasis of both the majority and the minority opinions from the Third Circuit in this case support this theory.

Those decisions which hold generally that the government cannot be estopped distinguish the no estoppel decisions from the estoppel decisions generally along four lines. First, the courts discuss the distinction between the government acting pursuant to its sovereign functions as opposed to a proprietary function. But, what of the immigration cases that have been before this Court where there is at least an implication that affirmative misconduct will estop the government? Second, the no estoppel cases identify the government's responsibility to protect the treasury on behalf of the people. The argument proceeds much as the dissenting opinion in this case proceeds. But, how will the government agents and employees ever learn to do their job correctly if there is no fear of punishment? Does this not promote incompetency? Would such a raid be any more dangerous to the Treasury than payments made to the victims of negligence on the part of a government employee by virtue of the Federal Tort Claims Act, 28 U.S.C. §2671 *et. seq.* Third, sovereign immunity is usually raised. The argument is that the government can only be charged when it consents and that unless there is a specific provision in the law, consent cannot be implied. Many times

this argument is negated if the particular government agency has authority to waive the resulting actions as in the instant case. Courts have also avoided the sovereign immunity argument where a larger congressional purpose is found which would justify estopping the government. Finally, arguments will center on a separation of powers and the need to let the executive branch enforce the laws enacted by the Congress. But, in the Constitutional system of checks and balances, do not the courts have the final authority as to matters of law to prevent or place limits on the other branches when they overstep their bounds?

2. ***Threshold Requirements to Estop the Government***

a. *Affirmative Misconduct*

As an initial matter, this Court's consistent use of a concept of "affirmative misconduct" by the government in discussing the possibility of applying the doctrine of equitable estoppel against the government seems to establish that the threshold test is whether the government engaged in "affirmative misconduct." As Davis has stated: "Law that only 'affirmative misconduct' may estop the government seems to be growing." 1982 Ad. Law Supp., *supra* at 255. A review of recent cases supports that conclusion. For example, in *California Pacific Bank v. Small Business Administration*, *supra*, the court stated: "[W]e still require, as a threshold showing, that to estop the government from raising the defense of illegality, one must demonstrate that the agent's actions constituted 'affirmative misconduct' ". See also *Leimbach v. Califano*, 596 F.2d 300 (8th Cir. 1979) and *Cornicl-Rodriguez v. INS*, *supra*.

b. *Justified Detrimental Reliance*

A review of recent cases also demonstrates that invariably the courts have required that the party asserting estop-

pel must have justifiably relied to its detriment. See, for example, *U.S. v. Browning*, 630 F.2d 694 at 703 (10th Cir. 1980), *cert. denied*, 451 U.S. 988 (1981); *Union Equity Cooperative Exchange v. C.I.R.*, 481 F.2d 812, 817 (10th Cir. 1973), *cert. denied*, 414 U.S. 1028 (1973); *Lawrenceville Nursing Home, Inc. v. Schweiker*, 528 F. Supp. 1370 (D.N.J. 1982), *aff'd*, 696 F2d 983 (3d Cir. 1982); *Douglas v. U.S.*, 658 F.2d 445 (6th Cir. 1981).

It is clear that there must be a reasonable basis for reliance which has detrimental results. In other words, if contributory negligence is present, a court may refuse relief. See, *e.g.*, *Hallenbeck v. Kleppe*, 590 F.2d 852 (10th Cir. 1979). A Third Circuit case characterized this requirement as follows:

> "[M]ere detrimental reliance is insufficient to support a claim of estoppel. That reliance must have been reasonable.
>
> 'One who claims that the benefits of an estoppel on the ground that he has been mislead by the misrepresentations of another must not have been mislead by his own lack of reasonable care and circumspection. A lack of reasonable diligence by a party claiming an estoppel is generally fatal. If a party conducts himself with careless indifference to the means of information reasonably at hand or ignores highly suspicious circumstances, he may not invoke the doctrine of estoppel.' 28 Am. Jur.2d §§ 79-80."

Brown v. Richardson, 395 F. Supp. 185, 191 (W.D. Pa. 1975). Significantly, this statement of law is derived from 28 Am. Jur.2d §§ 79-80. The sentence following the above-cited quote in 28 Am. Jur.2d § 80 clearly equates good faith with the exercise of reasonable diligence and reliance upon the words and conduct of the other party. In this case the PRRB concluded that CHS acted in good faith which

would seem to establish the reasonable diligence and reliance standard.

It is also noted that the First Circuit has indicated that (at least in immigration cases), government misconduct must have induced the petitioner to act in a way that he would not otherwise have. *Akbarin v. INS*, 669 F.2d 839, 843 (1st Cir. 1982).

c. *Other Requirements for Which Proof has Sometimes Been Required*

Certain courts have also required proof of the existence of other factors before the government will be equitably estopped.

Particularly in the United States Court of Appeals for the Ninth Circuit the following elements are required:

> (1) the party to be estopped must have known the facts;
>
> (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel had a right to believe it was so intended;
>
> (3) the latter must have been ignorant of the true facts; and
>
> (4) he must have relied on the former's conduct to his injury.

See, *e.g.*, *U.S. v. Ruby Co.*, 588 F.2d 697, 703 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979); *U.S. v. Harvey*, 661 F.2d 767 (9th Cir. 1981); *U.S. v. Georgia-Pacific Co.*, 421 F.2d 92 (9th Cir. 1970); *New York Athletic Supply Co., Inc. v. U.S.*, 450 F. Supp. 469, 471 (S.D.N.Y. 1978).

In addition, many courts have applied a test whereby a determination is made as to whether the injustice caused

by the government's misconduct is sufficiently severe to outweigh the countervailing interest of the public not to be unduly damaged by the imposition of estoppel. See, *e.g.*, *Worley v. Harris*, 666 F.2d 417 (9th Cir. 1982); *U.S. v. Ruby Co.*, *supra*; *U.S. v. Wharton*, 514 F.2d 406 (9th Cir. 1975).

In applying the balancing test, it is relevant to consider whether the government action for which estoppel is sought constitutes discretionary action and whether estoppel would result in a charge on public funds or lands. See, *e.g.*, *Gressley v. Califano*, *supra*. As the Seventh Circuit discussed in *Gressley*, the choice by the government whether to enforce or not to enforce a right to sue is discretionary, whereas the government's implementation of a Congressional mandate to pay statutory benefits is non-discretionary. Accordingly, it may be concluded that if the government's action is non-discretionary, and if estoppel would result in a charge on public funds or lands, the courts will be more reluctant to estop the government than if the government action is discretionary and there would be no charge on public funds or land.

In summing up, it is useful to consider the efforts of commentators to synthesize the various analytical frameworks which courts have applied to consider assertions of equitable estoppel against the government.

> "Estoppel or no estoppel against the government was traditionally, and in some cases still is, made to depend upon the distinction between performance of a governmental as distinguished from a proprietary function, and upon the agent's conduct as within or beyond the scope of his authority in a particular situation. *In some recent cases, however, the courts have turned away from these traditional pigeonholes, and considered the basic question of what is justice in a*

> *particular situation*, concerning themselves only with determining whether the proper elements of an equitable estoppel were present, and whether recognition of the equities to estop the government will harm the public's interest."

Annotation, Modern Status of Applicability of Doctrine of Estoppel Against Federal Government and Its Agencies, 27 A.L.R. Fed. 702, 710 (1976). (Emphasis added.)

Davis also subscribes to a view summarized in the language underscored above—that the critical test is "what does justice require under the circumstances?" Davis, 1982 Ad. Law Supp., *supra* at 252.

CONCLUSION

The problems confronting respondents arose from the conduct of the Secretary and the Secretary's intermediary, Travelers. Unless the doctrine of estoppel applies, the Secretary will inflict an injury and damage upon CHS, the individual respondents and the public, even though the situation arose directly from the acts and omissions of the Secretary and her agents. Our system of justice is premised on the concept of responsibility for one's own actions and this concept must be applicable to the administrative branch of government in its dealings with the public, as well as between members of the public. The concept that government should not be estopped is outmoded. That concept is socially unacceptable. What does justice in our present society require? If a government employee is negligent and his negligence causes a personal injury, the injured person is assured of recovery for his damages. So too where misleading governmental conduct has induced reasonable detrimental reliance, the government, like any other party, should be estopped to prevent an injury. Pos-

sibly some circumstances should require a court to withhold equitable relief, but it is difficult in even a limited way to perceive of such circumstances and the burden to prove such circumstances should rest with the government. The public would suffer unacceptable harm if the Secretary's views are adopted. No one could rely on the government. The Court of Appeals' decision should be affirmed.

Respectfully submitted,

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No. 83-56

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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Respondents and amici make little effort to answer our arguments that this case does not satisfy traditional estoppel principles, much less involves "affirmative misconduct" as that term has been construed in this Court's decisions. Instead, they offer a host of points in support of their contention that the Court should depart from its longstanding refusal to invoke equitable estoppel against the government. None of the points raised suggests that the Court should abandon the considered principle that the government may not be equitably estopped from enforcing the law. Nor do the briefs succeed in explaining why it would be appropriate to depart from the general rule in order to free CHS from the obligation to repay the Medicare funds it received for expenses already reimbursed under another federal program.

1. Respondents assert (Br. 11) that our position is based on the premise that "the government can do no wrong." That characterization is incorrect. Indeed, the very problem in this and similar cases is that government employees and agents *do* make errors in the course of performing their duties. The point at issue here is whether such errors should disable the government from relying on relevant statutes and regulations. As we explained in our opening brief (Gov't Br. 18-26), there are strong reasons, grounded in both policy concerns and constitutional considerations, for the courts to refrain from applying principles of equitable estoppel to the government in those cases.[1]

Respondents attempt to minimize the importance of the requirements imposed by statutes and regulations. They vigorously criticize what they characterize as the Secretary's emphasis on the "sanctity" of her regulations and the need for "blind adherence" to them, as well as the Secretary's purported compulsion "blindly and rigidly" to enforce those regulations (Resp. Br. 18, 19). Amici, while not openly critical of the Secretary's attempt to enforce regulations, urge that estoppel in this case would not offend the

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[1]Respondents contend (Br. 29) that estoppel is necessary to ensure that government employees will learn how to do their jobs correctly. But it is inappropriate for the courts to prevent the government from enforcing the law in the hope that such "discipline" will have the effect of reducing the number of government errors in the future. While such "punitive" estoppel might occasionally lead to increased supervision of government employees and improved performance, there is no assurance that this will occur; instead, the result could be a sharp decline in the willingness of government agencies to make efforts to provide assistance to citizens. See Braunstein, *In Defense of a Traditional Immunity: Toward an Economic Rationale for Not Estopping the Government*, 14 Rutgers L.J. 1, 31-39 (1982). In the Medicare program, for example, intermediaries might simply decline to answer providers' inquiries, rather than risk estoppel in the event the advice proved to be erroneous. See *Schweiker* v. *Hansen*, 450 U.S. 785, 790 & n.5 (1981).

principle of separation of powers because no congressional mandate forbids payment of the funds at issue. National Association for Home Care, etc. (NAHC) Br. 7.

These comments reflect an inappropriate disregard for the Secretary's responsibilities to enforce the law and to administer the Medicare program in a reasonable and consistent manner. The fact that a government employee or agent has rendered erroneous advice does not remove the Secretary's broader enforcement and administrative responsibilities. Even if such advice might lead to estoppel of a private party (and we have shown it would not in this case, see Gov't Br. 26-36), this Court has stressed that "the Government is not in a position identical to that of a private litigant with respect to its enforcement of laws enacted by Congress." *INS* v. *Hibi*, 414 U.S. 5, 8 (1973). Accord, *United States* v. *Mendoza*, No. 82-849 (Jan. 10, 1984), slip op. 5.

Contrary to the suggestion of amici (NAHC Br. 7), the Secretary's responsibilities are not confined to enforcement of what appears on the face of the Medicare statute. Congress has delegated to the Secretary the authority to define reimbursable "reasonable cost" under the Medicare program. See Gov't Br. 5. In view of that express delegation of substantive authority, the Secretary's determinations are entitled to "legislative effect." *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 44 (1981). Moreover, Congress provided expressly in the Medicare statute for the reopening of reimbursement determinations in the case of overpayments or underpayments. See Gov't Br. 6. Thus, precluding the Secretary from recovering from CHS for reimbursed expenses not covered by Medicare *would* be contrary to the express mandate of Congress. Indeed, even if there were no statutorily mandated recovery mechanism, it could hardly be consistent with the legislative intent for a court to relieve a provider of any obligation to repay when it has claimed

and received reimbursement for the same expenses under two different federal programs.[2]

2. Amici contend (NAHC Br. 9-10, 13-14) that allowing the Secretary to recover the overpayments CHS received would be inconsistent with the policy and structure of the Medicare program. They stress that providers are expected to consult with intermediaries and that they benefit from certainty.

Recovery of the overpayments in this case is in no way inconsistent with the policy and structure of the Medicare program. As we noted above, Congress chose not to specify in detail the expenses that would be reimbursable under Medicare, but delegated that responsibility to the Secretary. Under such a statutory scheme, there cannot always be complete certainty about the treatment of a given cost. The Secretary must develop principles of reimbursement through regulations, informal guidelines, interpretation, advice, and adjudication. Congress expressly recognized the potential for error in such a system and the need for a corrective mechanism; it therefore prescribed reopening and recovery in the case of overpayments and underpayments. That congressionally mandated process is simply inconsistent with

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[2]Respondents suggest (Br. 16) that CHS in fact had a substantive entitlement to reimbursement for the salaries of the CETA employees and that the only dispute is over a technical question of offset to the amount claimed. CHS presumably would have been entitled to Medicare reimbursement for the salaries if it had not also received CETA funds to cover them. But once CHS claimed and received the CETA funds, there was no substantive entitlement to receive Medicare funds for the same expenses.

Respondents also contend (Br. 17) that estoppel of the Secretary in this case will have no effect on the public treasury. This assertion is both irrelevant (see *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982), slip op. 5) and incorrect. As respondents acknowledge, Congress would have to appropriate funds to cover any shortfall in the Medicare trust fund.

the theory that a provider is entitled to finality in connection with every reimbursement determination.[3]

Furthermore, while a provider may consult with its intermediary, such consultation does not eliminate any obligation to return funds that the provider was not entitled to receive. Of course, intermediaries are expected to perform their statutory duties competently, and it appears that in most cases they fulfill these expectations and render correct advice. But the statutory and regulatory provisions for reopening make it clear that intermediaries do not have the final word on interpretation of the Medicare statute and regulations.[4] Ultimately the provider must exercise its own

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[3]Amici contend (NAHC Br. 11-13) that the provisions for reopening of reimbursement determinations and recovery of overpayments are meant only to allow correction of estimation errors or oversights in the computation of interim payments. That contention, which was not raised in the courts below, is incorrect. The statutory provision and the Secretary's regulation are not so narrowly confined on their face, and amici cite no legislative history that would support their reading. In the past, the Secretary has applied the reopening provisions to recover overpayments made because of prior erroneous interpretations of the Medicare statute and regulations. See, *e.g.*, *Abbott-Northwestern Hospital, Inc.* v. *Schweiker*, 698 F.2d 336, 338-339 (8th Cir. 1983); *River Garden Hebrew Home for the Aged* v. *Califano*, 507 F. Supp. 221 (M.D. Fla. 1980). It would be peculiar indeed if the recovery provisions did not apply to all types of overpayments, including those that result from a provider's or an intermediary's incorrect interpretation of the statute.

[4]Both respondents and amici characterize intermediaries as the Secretary's agents. In many respects, an intermediary does act on behalf of the Secretary in performing its duties under the Medicare program. But the Medicare statute and regulations make it quite clear that an intermediary has no authority to render final reimbursement determinations. At least within the three-year period provided under 42 C.F.R. 405.1885, the intermediary's reimbursement determinations are expressly subject to review and reversal by the Secretary. Thus, the intermediary's role as the Secretary's agent for some purposes cannot provide grounds for binding the Secretary when the intermediary renders erroneous advice.

judgment, since under the terms of the statute it bears the risk that it will be required to repay funds if the Secretary eventually concludes that payment was erroneous.

3. Respondents urge vigorously (Br. 19-20) that Travelers, the intermediary, was "grossly negligent" and that the Secretary should have pursued Travelers rather than CHS in order to obtain satisfaction for the reimbursement error. But respondents themselves argued at every stage below that Travelers' advice was correct, and even now they do not concede the correctness of the Secretary's determination that CHS should not have received the Medicare payments at issue (see Resp. Br. 13). Thus, respondents are hardly in a position to contend that the advice Travelers rendered in itself would constitute grounds for liability on Travelers' part.

Respondents suggest that Travelers acted negligently in failing to refer the question of CETA employee salaries to HHS when CHS first raised it. Travelers could have raised the issue with HHS after it first arose during a meeting in which CHS consulted Travelers about a variety of cost issues (see PRRB Record at 196-197). In retrospect perhaps Travelers should have done so. But an intermediary obviously cannot consult HHS on every point; otherwise, the intermediary system would become unwieldy and ultimately pointless. Indeed, the contract between HHS and Travelers required the latter not only to serve as a channel of communication with the Secretary, but also to make coverage and payment determinations (subject to review by the Secretary). See 42 U.S.C. (Supp. V) 1395h(a); PRRB Record at 288.[5]

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[5]Contrary to respondents' suggestion, it is not evident in this case that Travelers breached any duty, contractual or otherwise, to serve as a channel of communication. The record does not indicate that CHS specifically requested in 1975 or 1976 that Travelers contact HHS about

Travelers and CHS both erred in interpreting the Secretary's regulations. But it was CHS that acted on the basis of the error by claiming reimbursement for the salaries of the CETA employees. And it was CHS, not Travelers, that actually received the funds. There is nothing unusual or unfair about the Secretary's decision to recover erroneous payments from the party that actually received them, particularly when Congress expressly provided for such recovery.[6]

In any event, respondents' focus on Travelers' alleged negligence is simply one manifestation of their repeated contention that CHS was not at "fault" in accepting double reimbursement for the CETA workers' salaries. But CHS is required to return the erroneous payments because they were not allowable under the Medicare program, not because CHS was at fault in accepting them. As we noted in our opening brief (Gov't Br. 26), Congress has authorized the Secretary to waive recoupment under other parts of the Social Security Act where the recipient of an overpayment was not at fault, but it has not done so under the Medicare program in the case of provider "reasonable cost" determinations.

4. Amici suggest (NAHC Br. 8) that allowing estoppel of the government in this case is unlikely to lead to a flood of claims. The long list of lower court decisions cited by

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the treatment of the CETA salaries; thus, Travelers might have taken the position that there was no "communication" to be channeled to the Secretary. When CHS did finally press Travelers about the question in 1977, the intermediary contacted HHS and promptly communicated HHS's reply to CHS.

[6]As we explained in our opening brief (Gov't Br. 42 n. 19), it appears that the Secretary would not be able to hold an intermediary liable for payments it certifies in the absence of gross negligence or intent to defraud the government.

respondents (Br. 26-28) itself appears to disprove this suggestion.[7] Moreover, respondents assert forthrightly that the rule against estoppel of the government is "outmoded" and "socially unacceptable" (Resp. Br. 34). They acknowledge that "[p]ossibly" a court should withhold equitable relief against the government in some circumstances, but they contend that "it is difficult in even a limited way to perceive of such circumstances and the burden to prove such circumstances should rest with the government" (*id.* at 34-35). The standard they propose is that "the government may be estopped when justice so requires" (Resp. Br. 26 (quoting K. Davis, *Administrative Law Treatise* § 17.01, at 252 (1982)); see also Resp. Br. 34). It seems clear that such a principle would not be easy to contain.

5. Respondents rely ultimately on the contention that the government should not be permitted to "injure and damage" them (Resp. Br. 11) and that CHS will go out of business if the Secretary is not estopped (*id.* at 22). But the Secretary is merely seeking recovery of payments CHS was never entitled to receive and that were duplicated by funds it received under another federal program. Such a recovery simply cannot qualify as "injury" that would warrant estoppel of the Secretary.

As we explained in our opening brief (Gov't Br. 35), respondents' concerns about the effect on CHS of repayment appear to be exaggerated, since there are methods of repayment that would mitigate any hardship to CHS. In

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[7] Amici characterize *Moser* v. *United States*, 341 U.S. 41 (1951), and *United States* v. *Stinson*, 197 U.S. 200 (1905), as cases in which this Court accepted the principle of estoppel against the government. NAHC Br. 5. As we explained in our opening brief (Gov't Br. 19-20 n.6), *Moser* does not appear to involve the issue of estoppel. The decision in *Stinson* rested not on estoppel, but on the government's failure to meet its burden of proof in an action to set aside allegedly fraudulent land patents.

addition, it is difficult to believe that CHS is entirely without sources of funding other than Medicare. Respondents themselves acknowledge (Br. 5) that CHS's annual budget has risen to approximately $900,000.[8] In any event, the method of repayment is not at issue at this stage of the proceedings and need not be considered by the Court. See *Bell* v. *New Jersey*, No. 81-2125 (May 31, 1983), slip op. 5 n.4. The holding of the court of appeals, which respondents embrace, does not depend upon CHS's inability to repay the amounts unlawfully obtained under the Medicare program.

For the foregoing reasons and the additional reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

FEBRUARY 1984

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[8]In view of respondents' explanation (Br. 4-6) that the Crawford County Commissioners encouraged the expansion of services that was made possible by the double reimbursement of CETA employees' salaries and that Medicare payments were spent for the purpose of providing needed services, it might be expected that the County or a charitable organization would be willing to help CHS in its efforts to repay the funds. Of course, if recovery of the overpayments in this case would in fact create a "major medical crisis" in Crawford County (Resp. Br. 22), HHS could be expected to take that into account in connection with its attempt to recover the funds.

No. 83-56

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY
OF HEALTH AND HUMAN SERVICES,
Petitioner,

v.

COMMUNITY HEALTH SERVICES OF
CRAWFORD COUNTY, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT BRIEF FOR AMICI CURIAE NATIONAL ASSOCIATION FOR HOME CARE, PENNSYLVANIA ASSOCIATION OF HOME HEALTH AGENCIES, AMERICAN FEDERATION OF HOME HEALTH AGENCIES, AMERICAN HEALTH CARE ASSOCIATION, AMERICAN HOSPITAL ASSOCIATION, FEDERATION OF AMERICAN HOSPITALS, HOME HEALTH SERVICES AND STAFFING ASSOCIATION, AND NATIONAL COUNCIL OF HEALTH CENTERS IN SUPPORT OF AFFIRMANCE

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December 30, 1983

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INTEREST OF AMICI CURIAE

This brief *amici curiae* is filed in support of Respondent Community Health Services of Crawford County, Inc. (CHS). It is accompanied by the written consents of Petitioner and Respondent.

Amici curiae are several national and state organizations that together represent a broad spectrum of providers of health care services. The members of these organizations are home health agencies, hospitals, and

nursing homes and collectively account for the vast majority of the providers which render services to beneficiaries under Part A of the Medicare program. Many of these providers furnish all of their services to Medicare beneficiaries and, like CHS, are entirely dependent on Medicare reimbursement for the continuation of their patient care activities. CHS is a member of the National Association for Home Care and its state affiliate, the Pennsylvania Association of Home Health Agencies.

Providers of services enter into agreements with Petitioner Secretary of Health and Human Services (the Secretary) to furnish services to Medicare beneficiaries and, pursuant to the Medicare statutory scheme, primarily deal with the Secretary through fiscal intermediaries. These intermediaries serve as agents of the Secretary in explaining and implementing Medicare program policy. Intermediaries determine whether Medicare claims are covered, review and audit provider costs, and determine the amounts that will be reimbursed by the Medicare program. Given the central role of the Medicare program in enabling these providers to maintain services to their patients—the beneficiaries of the Medicare program—*amici curiae* have a strong interest in assuring that information received by their members from fiscal intermediaries is accurate and may reasonably be followed.

SUMMARY OF ARGUMENT

CHS repeatedly, over a three-year period, sought direction from its fiscal intermediary concerning the proper treatment of grants received under a federal employment program. The intermediary advised CHS that, under the Medicare regulations, the receipt and use of these funds would not result in a reduction of Medicare reimbursement. Based on that decision, CHS expanded its services using the additional funds it received. The Secretary subsequently disavowed her agent's interpretation of the rules and sought to require CHS to repay the amounts it had received in reliance on the intermediary's advice.

The Secretary incorrectly contends that this Court has categorically rejected the possibility of estoppel against the United States due to actions of government agents. At least in modern times, this Court has carefully avoided any such ruling; at the same time the courts of appeals have increasingly recognized that, in some circumstances, fundamental fairness dictates that private citizens not suffer the consequences of misrepresentations by government officials. The experience in the courts of appeals, and the limitations which have been placed on the role of estoppel, prevent occurrence of the widespread abuse and harm to Federal programs which the Secretary predicts.

Before taking any action, CHS in good faith sought a ruling from its fiscal intermediary, the entity it was expected to deal with and rely upon concerning Medicare reimbursement matters. The interpretation given CHS was not unreasonable, and CHS' reliance on it was wholly proper. Recovery, at this time, of the grants received by CHS would work a hardship on the innocent provider since CHS has spent the funds on other patient care services. Recoupment would also harm CHS' patients—the beneficiaries of the Medicare program and others unable to pay for their care—through the resulting diminution of services. In these circumstances, the decision of the court of appeals holding that the Secretary is estopped from seeking recoupment should be affirmed.

ARGUMENT

THE COURT OF APPEALS CORRECTLY ESTOPPED THE SECRETARY FROM RECOVERING MEDICARE PAYMENTS MADE PURSUANT TO THE ADVICE OF THE SECRETARY'S AGENT

CHS is a provider of home health services under the Medicare program, 42 U.S.C. § 1395 *et seq.* After receiving funds under the Comprehensive Employment and Training Act (CETA), 29 U.S.C. § 801 *et seq.*, CHS sought advice from Travelers Insurance Company, the fiscal intermediary which served as the agent of the Sec-

retary, concerning whether the amounts paid under CETA should reduce costs otherwise reimbursable under Medicare. Over a three-year period, the intermediary *repeatedly* assured CHS that no offset was required, and CHS expanded its operations and filed its Medicare cost reports consistent with that advice. Subsequently, the Secretary repudiated the interpretation of her agent and sought to recover the payments to CHS which resulted from the failure to offset the CETA funds. The United States Court of Appeals for the Third Circuit held, however, that CHS' reliance on the advice given by the Secretary's agent estopped her from recouping the funds paid to CHS. *Community Health Services of Crawford County, Inc. v. Califano*, 698 F.2d 615 (3d Cir. 1983).

The Secretary argues that the United States may never be estopped from enforcing the laws, and that to permit the government to be estopped by acts of its agents in any circumstances would violate constitutional principles and subject the government to uncontrollable liability. The Secretary further contends that estoppel, even if appropriate in some circumstances, was not properly applied in the case before the Court.

The cases decided by this Court, at least those in modern times, do not support the Secretary's arguments; this Court, and to an increasing degree the courts of appeals, have not established an absolute rule that prevents assertion of equitable estoppel against the government. Neither constitutional restrictions nor the other specters of fiscal disaster posited by the Secretary are supported by the facts before the Court or by the experience of the courts of appeals. The case for estoppel is especially strong here since the structure of the reimbursement program under Medicare, rather than preventing CHS from relying on the advice given by the fiscal intermediary, in fact gave it no choice but to rely on the intermediary's conclusion to its detriment. To permit the government to repudiate that decision would undermine the administrative scheme by which Medicare is operated.

I. Principles of Equitable Estoppel Do and Should Apply to the Federal Government

Contrary to the argument of the Secretary (Pet. Br. 18-21), this Court has not squarely rejected the application to the government of principles of equitable estoppel. While older cases such as *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917), do contain language appearing to bar the assertion of estoppel against the government,[1] modern cases have not reflected the absolute position asserted by the Secretary. In *Schweiker v. Hansen*, 450 U.S. 785, 788 (1981), although determining that no basis for estoppel existed in that case, the Court stated that it "has never decided what type of conduct by a Government employee will estop the Government from insisting upon compliance with valid regulations. . . ." Similarly, in *INS v. Miranda*, 103 S. Ct. 281 (1982), while holding that the delay in processing a visa petition would not justify estopping deportation proceedings, the Court very carefully avoided ruling on the question of whether estoppel could properly be imposed in other circumstances.[2]

By contrast, the Court implicitly accepted estoppel in *Moser v. United States*, 341 U.S. 41 (1951), where it unanimously held that incorrect advice given by the State

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[1] That position, however, was not uniform even in earlier cases. In United States v. Stinson, 197 U.S. 200 (1905), *aff'g*, 125 F. 907 (7th Cir. 1903), the Court affirmed a decision of the Seventh Circuit estopping the government from bringing an action against an individual and treating the government in the same manner as a private party.

[2] Further, the Court rejected as "unpersuasive" an analysis based on whether the use of estoppel would result in expenditure of public funds. 103 S. Ct. at 283-84. The implication of the Court's reasoning is that the determination of whether estoppel applies should be based on the facts of each case, rather than upon formalistic distinctions. Thus, the Secretary's contention (Pet. Br. 22-23) that estoppel is particularly unavailable in cases involving public monies is based on a distinction apparently rejected by this Court.

Department prevented the United States from claiming that an immigrant had waived his right to citizenship, despite the fact that *statutory* language establishing the waiver of citizenship was quoted on the face of the application Moser signed. While the Court in *Moser* spoke of an absence of knowing waiver, that result flowed from a conclusion that the incorrect advice given Moser barred the United States from relying on the contrary statutory language Moser was aware of—in other words, estoppel. Both courts and commentators have considered *Moser* to be a case of estoppel. *See, e.g., United States v. Lazy FC Ranch*, 481 F.2d 985, 988-89 (9th Cir. 1973); 4 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE 7-9 (2d ed. 1983).[3]

The courts of appeals have also recognized estoppel claims against the government in differing circumstances, both before and after *Schweiker v. Hansen*. They have found that the government can be estopped "where justice and fair play require it," and where "the government's wrongful conduct threatens to work a serious injustice and . . . the public's interest would not be unduly damaged by the imposition of estoppel." *United States v. Lazy FC Ranch*, 481 F.2d at 988, 989; *see, e.g., Home Savings and Loan Association v. Nimmo*, 695 F.2d 1251 (10th Cir. 1982); *Donovan v. Laborers' International Union Local 120*, 683 F.2d 1095 (7th Cir. 1982); *Deltona Corp. v. Alexander*, 682 F.2d 888 (11th Cir. 1982); *Johnson v. Williford*, 682 F.2d 868 (9th Cir. 1982); *Portmann v. United States*, 674 F.2d 1155 (7th Cir. 1982); *Akbarin v. INS*, 669 F.2d 839 (1st Cir. 1982); *N. Jonas & Co. v. EPA*, 666 F.2d 829 (3d Cir. 1981); *Investors Research Corp. v. SEC*, 628 F.2d 168 (D.C. Cir.), *cert. denied*, 449 U.S. 919 (1980); *Hansen v. Harris*, 619 F.2d 942, 959 (2d Cir. 1980) (Newman, J., concurring) (listing cases), *rev'd, Schweiker v. Hansen*, 450 U.S. 785 (1981); *United*

[3] In Montana v. Kennedy, 366 U.S. 308, 314-15 (1961), the Court, while concluding that no reasonable reliance on misinformation had been demonstrated, noted that it was not addressing the question of whether in some circumstances conduct of United States officials may give rise to estoppel.

States v. Fox Lake State Bank, 366 F.2d 962 (7th Cir. 1966).

The Secretary argues that estopping the government would violate the separation of powers doctrine by substituting judicial pronouncements for the will of Congress. Such an argument might be appropriate were estoppel invoked to defeat an express mandate of Congress. For example, in *Worley v. Harris*, 666 F.2d 417, 421-22 (9th Cir. 1982), a Social Security case involving a failure to offset disability benefits, the claim of estoppel was rejected because the offset was clearly required by statute.[4] Cases involving the application *vel non* of a statutory standard in a particular case should also be distinguished from circumstances where the courts would be asked to overcome the intent of Congress in the overall operation of a government program. Neither situation, however, is present in the instant case. Although the Secretary is directed to determine the "reasonable cost" of services provided under Medicare, Congress did not speak to the treatment by providers of grants received under CETA, or to whether such grants had to be used to reduce Medicare reimbursement.

Thus, contrary to the Secretary's contention (Pet. Br. 22-23), there was no explicit Congressional directive requiring exclusion of CETA funds from CHS' "reasonable cost"[5] or mandating the reopening of CHS' earlier cost reports. Certainly estopping particular actions of administrative officials, even though those actions are taken within a broad statutory mandate, does not so contravene Congressional direction as to raise a question under the separation of powers doctrine. As the Seventh Circuit concluded,

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[4] It should be noted, however, that the holding in *Moser* permitted Moser to retain his citizenship even though he had violated an express statutory condition.

[5] Indeed, as we discuss *infra*, even the Secretary's regulations do not contain such an explicit ruling.

> "[R]eliance on a separation of powers rationale to preclude estoppel against the government is considerably less persuasive where only an agency's own regulations are at stake than it would be where adherence to government misinformation threatens to contravene an explicit statutory requirement."

Portmann v. United States, 674 F.2d 1155, 1159 (7th Cir. 1982).

Recognition of estoppel in appropriate cases will also not ineluctably lead to "countless" claims and "intolerable burdens" on government operations (Pet. Br. 24, 25). Where there is little proof of erroneous advice, *N. Jonas & Co. v. EPA*, 666 F.2d 829, 934 (3d Cir. 1981), or where the advice given was at odds with clearly articulated policy or rules, *Werner v. Department of Interior*, 581 F.2d 168, 172 (8th Cir. 1978), or where little or no effort was made by the private party to determine whether the advice given was correct, *Lavin v. Marsh*, 644 F.2d 1378, 1383-84 (9th Cir. 1981), equity should not prevent adherence to established standards. *See Nason v. Kennebec County CETA*, 646 F.2d 10 (1st Cir. 1981) (no estoppel where recipient was warned its proposed action would be improper and government sought recoupment within three months).

Similarly, application of normal principles of equity will ensure that no excessive harm will be caused the government or the public through estoppel. The Ninth Circuit has clearly recognized the duty of courts in cases where estoppel is claimed against the government to "balance the countervailing interest of the public" to prevent undue damage. "These policy factors may militate against application of estoppel even though the technical elements of the doctrine are present." *United States v. Ruby Co.*, 588 F.2d 697, 703 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979); *see Johnson v. Williford*, 682 F.2d 868, 871 (9th Cir. 1982); *United States v. Harvey*, 661 F.2d 767, 773 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 74 (1982); *cf. Mathews v. Eldridge*, 424 U.S.

319, 334-35 (1976) (balancing of private and governmental interests in Due Process analysis); D. DOBBS, REMEDIES 52-53 (1973). The harms foreseen by the Secretary are thus not inherent in the application of estoppel in some cases, and do not appear to have occurred despite the recognition of estoppel by the courts of appeals for several years.

Moreover, estopping the government from taking action against those misled by its agents promotes sound policy. In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982), the Court declared that depriving a private party of substantive rights due to the negligence of government officials was a deprivation of Due Process for which the private party should not have to bear the burden. Similarly, the Court has held that a person cannot be criminally convicted for conduct which a government official advised was proper, even though it was contrary to established law. *Cox v. Louisiana*, 379 U.S. 536 (1965); *Raley v. Ohio*, 360 U.S. 423 (1959).

If an agent of the Secretary misleads a party such as CHS into expending funds based on anticipated reimbursement, imposing the cost of the government's error on CHS offends the same notions of fairness. As Justice Jackson remarked,

> "It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street."

Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 387-88 (1947) (Jackson, J., dissenting). In the case of Medicare (or similar Federal programs) which relies on participation by private organizations to provide public benefits, the Secretary's position would make it impossible for providers ever to ascertain their rights definitively.[6] The resulting uncertainty could impede effectua-

[6] Under the Secretary's argument, even if CHS had obtained advice directly from the Health Care Financing Administration

tion of Congress' purpose in enacting Medicare—to provide health care for the aged—by placing Medicare providers in a position where patient care services cannot be rendered unless there is absolutely no question but that the provider will be reimbursed. Failure to permit reliance on an intermediary's advice could also encourage providers to seek to bypass the intermediary, altering the congressional scheme and placing additional administrative burdens on the Secretary.

In sum, the Secretary is incorrect in asserting that this Court has rejected the application of estoppel against the government. The majority of the courts of appeals have held that certain government actions will form the basis for estoppel, and this Court has carefully avoided any categorical ruling on the question. Further, the claims that operation of government will be significantly harmed if parties are permitted, in limited circumstances, to estop the government are untenable. Permitting estoppel is consistent with the approach taken by this Court under the Due Process clause, and with a general recognition that the government should be bound by similar requirements of fairness as are applied to private parties. *See Portmann v. United States*, 674 F.2d 1155, 1159 (7th Cir. 1982). The Court should reject the categorical preclusion of estoppel urged by the Secretary.

II. Estoppel Was Properly Applied to the Secretary's Claim against CHS

The Third Circuit correctly found that the Secretary is estopped from recouping payments made to CHS following the intermediary's decision that CHS should not offset CETA grants in computing its Medicare reimbursement. In attempting to show that CHS did not reasonably rely on the advice of the intermediary, the Secretary has painted a distorted picture of the Medicare program, the

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(HCFA), the Secretary would be free to change her position and insist on recovering funds paid to CHS based on the original advice.

role of the fiscal intermediary, and the process of interim payments with subsequent adjustments.

The requirements for estoppel were present in this case. CHS sought an interpretation from its fiscal intermediary—the Secretary's agent—which under the Medicare scheme is the established contact point for providers to obtain guidance concerning Medicare policy. The advice given CHS was based on a reasonable construction of the Medicare regulations, and it was proper for CHS to rely on the intermediary's judgment in planning its operations even if the Secretary later disavowed her agent's interpretation. Further, CHS changed its position based on the intermediary's directive and will be harmed if it is made to bear the burden of the Secretary's repudiation of her agent's decision.

The Secretary argues (Pet. Br. 28-29) that a provider like CHS can never rely on an intermediary's advice since the Medicare program contemplates adjustments to providers' reported costs with subsequent recoupment of excess interim payments. Closely linked to this argument is the contention (Pet. Br. 23-24) that acceptance of estoppel would foreclose carrying out of Congress' plan under Medicare. The Secretary suggests, therefore, that there could never be reasonable reliance in the Medicare context on representations by intermediaries (Pet. Br. 33).

The Secretary confuses the instant situation—where a provider faced with a decision on treatment of one particular item repeatedly asked for and received advice from the intermediary *before* receiving interim payments or incurring costs—with the normal situation where a provider's interim payments (which by their very nature are tentative) are adjusted when definite figures become available. A normal interim payment to a provider does not bespeak any determination of allowable costs, and the Secretary is certainly entitled to recoup earlier interim payments when errors in estimates and accounting procedures are discovered.

The limited purpose of the Secretary's regulation permitting retroactive adjustment was described in *Columbia Heights Nursing Home and Hospital, Inc. v. Weinberger*, 380 F. Supp. 1066, 1072 (M.D. La. 1974), where the court stated:

> "[T]he purpose of this regulation is simply to bring the interim payments, made on an estimated basis to the provider, into agreement with the actual amount to which he is entitled based upon actual rather than estimated costs. . . . Neither the Act nor the regulations contemplated the rules to be changed after the game has been played."

In *Columbia Heights*, the court rejected the retroactive application of a new accounting system since the provider had in good faith followed a system mandated by the Secretary's agent. Moreover, as in this case, the first notice to the provider came long after it could have changed its operation to prevent a loss. *See Adams Nursing Home of Williamstown, Inc. v. Mathews*, 548 F.2d 1077, 1082 n.14 (1st Cir. 1977).

The Third Circuit also recognized this distinction in rejecting estoppel against the Secretary in *New Jersey v. Department of Health and Human Services*, 670 F.2d 1284, 1296-97 (3d Cir.), *cert. denied*, 103 S. Ct. 56 (1982). There, New Jersey claimed that it was entitled to additional reimbursement under Medicaid even though its approved state plan had not covered the individuals to whom services were provided. New Jersey asserted that it should nevertheless receive the additional reimbursement because the Secretary had failed to inform the State that coverage for those individuals was available. The court of appeals found, however, that there had been no misrepresentation or wrongful concealment which led to the State's detriment.

This case, however, is different. Here a determination was made by the Secretary's authorized agent, *prior to*

CHS' filing its cost reports, that CETA funds did not have to be offset, and CHS proceeded on the basis of that determination. The fact that CHS sought and obtained a definitive ruling from the Secretary's agent sets this situation apart from the normal reimbursement proceedings to which the Secretary alludes.

The courts of appeals have required that estoppel be predicated on an affirmative act. *E.g.*, *Deltona Corp. v. Alexander*, 682 F.2d 888, 892 (11th Cir. 1982); *Oki v. INS*, 598 F.2d 1160, 1161-62 (9th Cir. 1979). Under this standard, the lack of government action prior to or at the time interim payments are made to providers would not establish any reliance. Only in the situation of CHS, which sought and received a ruling from the Secretary's agent before seeking reimbursement, does estoppel become an issue. The Secretary's contrary argument is only another attempt to obscure, under the guise of potential disaster for Federal programs, the injustice which would be done to CHS.

The Secretary's position would undermine stability in the Medicare system since any reimbursement decision—even one made at the Secretary's explicit direction—could be overturned and the provider forced to suffer the consequences of its good faith reliance, no matter how well-established. The regulation permitting reopening of cost determinations merely enables the Secretary to seek recoupment for past payments where specific types of errors or oversights, not present here, have occurred; it does not automatically entitle her to that relief, and the Secretary's argument that the regulation means more is mere bootstrapping.

In support of her contention that CHS could not reasonably have relied on the directions it received, the Secretary disputes (Pet. Br. 30 n.10) the court of appeals' conclusion that, in seeking direction from the intermediary, CHS had sought the most authoritative advice it

could obtain. This argument fails on several counts. First, although CHS could have made an independent determination that the intermediary was wrong and not sought Medicare reimbursement for the employees covered under the CETA grants, that action would have eliminated any possibility of receiving the funds if the intermediary had been correct. Failure to seek reimbursement would have reduced the level of service CHS provided, a step which, in view of the intermediary's conclusion, should not be deemed necessary for CHS to protect itself.

Second, the fiscal intermediary is the entity which providers are supposed to deal with in conducting their operations. Under 42 U.S.C. § 1395h(a), a provider nominates an intermediary to determine the amount of the payments required to be made under Part A of the program and to make those payments. Further, the statute specifies that the fiscal intermediary may "serve as a center for, and communicate to providers, any information or instructions furnished to it by the Secretary, and serve as a channel of communication from providers to the Secretary." 42 U.S.C. § 1395h(a)(2)(A). The structure and operation of the program clearly contemplate that providers will deal directly with their fiscal intermediaries and not the Secretary.

Under 42 U.S.C. § 1395h(f), the Secretary must evaluate intermediary performance in determining whether to enter into, renew, or terminate an agreement with a fiscal intermediary. The Secretary's regulations specify that an intermediary must have "the overall resources and experience to administer its responsibilities under the Medicare program" and presumes that this requirement is met if the organization "has at least five years experience in paying for or reimbursing the cost of health services." 42 C.F.R. § 421.110(c)(3). One of the specific performance criteria developed by the Secretary, 42 C.F.R. § 421.120(e)(3), involves the intermediary's capability in applying reimbursement principles:

"[T]he intermediary must:

* * * *

(3) Accurately apply the principles of reimbursement to assure that only reasonable and allowable costs incurred in furnishing covered services to Medicare beneficiaries are reimbursed by the Medicare program based on cost reports received from providers. . . ."

Finally, administrative review of many reimbursement decisions is conducted by the intermediary itself, not the Secretary. 42 C.F.R. § 405.1809.[7] Thus, fiscal intermediaries are selected based upon their expertise in reimbursement matters and intended to be the contact point between providers and the Secretary on such matters.[8]

A further indication of the importance placed on the role of intermediaries is section 14 of the Medicare-Medicaid Anti-Fraud and Abuse Amendments of 1977, Pub. L. No. 95-142, which authorized the Secretary to assign or reassign providers to certain intermediaries if

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[7] For cost reporting periods ending prior to June 30, 1973, fiscal intermediaries were responsible for providing hearings on all matters where the amount in controversy was at least $1,000. 42 C.F.R. § 405.1809. For periods ending on or after June 30, 1973, intermediaries are responsible for conducting hearings where the amount of program reimbursement in controversy is at least $1,000 but less than $10,000. *Id.* For cost reporting periods ending on or after June 30, 1973, hearings for matters involving $10,000 or more are conducted by a statutorily established Provider Reimbursement Review Board. 42 U.S.C. § 1395oo.

[8] A few providers deal directly with the Secretary through the Office of Direct Reimbursement. 42 U.S.C. § 1395g. As of August 1983, the Secretary's data indicated that 1,211 of the 12,800 providers and other entities that currently participate in the Medicare program receive payment directly from the Secretary. 48 Fed. Reg. 34979. Under the statute, dealing with a fiscal intermediary or the Secretary's Office of Direct Reimbursement are equally acceptable alternatives. Accordingly, providers have no reason to place less reliance on a determination by an intermediary than they would on the same determination by an HHS official.

she determines that such actions would result in more effective and efficient administration of the Medicare program. The Secretary was also given the authority to designate regional or national intermediaries for different classes of providers. *See* 42 C.F.R. §§ 421.114, 421.116. Further, section 930(o) of the Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, amended the statute to require the Secretary to designate regional intermediaries for freestanding (i.e., nonaffiliated) home health agencies.[9]

There are no established or mandated procedures for providers to use to address to the Secretary questions such as the one raised by CHS. In this case, the fiscal intermediary operated as the Secretary's agent and by virtue of its selection as an intermediary had been determined to possess expertise on which CHS could reasonably rely. In applying estoppel in *Moser*, this Court found it significant that Moser had sought advice "from the highest authority to which he could turn. . . ." 341 U.S. at 46. By repeatedly questioning the intermediary, CHS did the same, and the Secretary is wrong in arguing that CHS had to treat the intermediary's advice as meaningless.[10]

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[9] The Secretary has recently proposed rules to reduce the number of providers that deal directly with the Secretary's Office of Direct Reimbursement. 48 Fed. Reg. 34979. The Secretary justified the effort to withdraw from direct reimbursement activities by stating her intention "to contract with existing or newly established Medicare fiscal intermediaries or other organizations, whose accountants are also specialists in Medicare principles of provider reimbursement." *Id.* at 34981. This rulemaking proceeding followed an earlier attempt by the Secretary to phase out the Office of Direct Reimbursement. That proceeding was enjoined because of the Secretary's failure to comply with the Administrative Procedure Act. National Association of Home Health Agencies v. Schweiker, 690 F.2d 932 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 1193 (1983).

[10] The suggestion by the Secretary that CHS' repeated requests for advice demonstrate uncertainty so as to foreclose reliance on the intermediary's ruling is fundamentally at odds with the Secretary's regulations and Congressional pronouncements favoring close consultation between providers and intermediaries. Under the Sec-

The intermediary's conclusion that CETA funds did not have to be offset was also reasonable. It did not directly conflict with either the statute or the Medicare regulatory scheme. Thus, contrary to the Secretary's argument (Pet. Br. 32), CHS had no reason to question the intermediary's judgment.[11] First, the statute says nothing about offsets for grants received by a provider, but only sets a standard of "reasonable cost." 42 U.S.C. § 1395x(v)(1)(A). The Medicare regulations authorize providers to receive unrestricted gifts and grants without reducing the costs they report for Medicare reimbursement purposes. 42 C.F.R. § 405.423(a). Thus, the Secretary has not construed Congress' intent as precluding reimbursement in all instances where providers receive payments from other sources for the same expenses.

While the Secretary did state a general policy in the Medicare regulations of offsetting donor-restricted funds, 42 C.F.R. § 405.423(c)(2), the Medicare Provider Reimbursement Manual published by the Secretary admits of an exception to that policy for "seed money," defined as "[g]rants designated for the development of new health care agencies or for expansion of services of established agencies. . . ." [12] Contrary to the Secretary's claim, there was no absolute policy requiring that CETA grants

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retary's proposed standard, a single request might be deemed reliable, but not a continuing consultation. The Ninth Circuit has correctly held that the repetition of misinformation by a government official adds to the injustice of a subsequent refusal to stand by that advice. *Johnson v. Williford*, 682 F.2d at 872.

[11] This Court commented in Schweiker v. Gray Panthers, 453 U.S. 34, 43 (1981), that

> "The Social Security Act is among the most intricate ever drafted by Congress. Its Byzantine construction, as Judge Friendly has observed, makes the Act 'almost unintelligible to the uninitiated.' *Friedman v. Berger*, 547 F.2d 724, 727 n. 7 (CA 2 1976), cert. denied, 430 U.S. 984 (1977)."

[12] HIM-15, Pt. 1 § 612.2.

be offset since, at least for seed money, no such offset was required. Thus, seed money and other types of gifts and grants often do not reduce a provider's allowable Medicare costs.

The grants CHS received under CETA were used to employ new personnel to expand the services CHS provided. *Community Health Services*, 698 F.2d at 617. Since expansion of services of established agencies is one of the functions of seed money, the intermediary's conclusion that the CETA grants were seed money was not so unreasonable as to have alerted CHS that the advice was wrong. Although the Secretary may have acted within her discretion in ultimately determining that CETA funds must be offset by a Medicare provider, her argument that the contrary advice given by her agent clearly offended the Medicare scheme has no merit. Moreover, the Secretary's subsequent rejection of her agent's interpretation does not justify penalizing the innocent provider (as opposed to the agent which gave CHS the repeated assurances) for its reliance on the original advice.

In *Molton, Allen and Williams, Inc. v. Harris*, 613 F.2d 1176 (D.C. Cir. 1980), the court pointed out that in *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), the Department of Agriculture regulations (which were referenced in the insurance application) had explicitly excluded reseeded crops from coverage. The application, therefore, gave Merrill at least constructive notice that the insurance he sought was not available. Where no statute or regulation explicitly applies, the D.C. Circuit reasoned that it could not rule out estoppel based on acts of government agents. *Id.* at 1179. Neither the statute nor the Medicare regulatory scheme explicitly required offset of CETA payments; indeed the payments arguably did constitute seed money in which case CHS' actions would have been explicitly permitted.

By contrast, the First Circuit held that estoppel could not apply in *Nason v. Kennebec County CETA*, 646 F.2d 10 (1st Cir. 1981), since the local CETA director had been advised, prior to hiring an individual, that his employment would not be covered under the Act. In that situation, the local CETA organization could not contend that it had relied to its detriment on any misinformation. In the instant case, however, it was quite reasonable for CHS to rely on the intermediary's interpretation of the regulations; indeed as a practical matter, it had little choice but to do so. Under the principle recognized in *Molton*, the Secretary should be estopped from retroactively rescinding that interpretation. *See Portmann*, 674 F.2d at 1158, 1163 (estoppel warranted on basis of following plausible, albeit incorrect, interpretation of regulations).

There is also no doubt that CHS would be harmed if, despite its reliance on the intermediary, the Secretary were able to recover the payments made to CHS. In many cases where estoppel has been denied, the private party did not worsen its position based on the misinformation it received. For example, in *Merrill*, the farmer would have been uninsured even if he had not been misinformed, since there was no other insurance he could have obtained. *See Portmann*, 674 F.2d at 1162-63.

By contrast, the incorrect advice here adversely affected CHS, since CHS relied on it both in planning its operations and in seeking reimbursement.[13] CHS ex-

[13] Under the Medicare program, a provider's reimbursement is limited to its reasonable costs, 42 U.S.C. § 1395f(b), and it may not charge program beneficiaries for items or services not covered by the Medicare program, 42 U.S.C. § 1395cc(a)(1). Because of these limitations, CHS' plight in the instant case is evident. Due to the fiscal intermediary's advice, CHS received monies which it legitimately expended to furnish needed health services to Medicare beneficiaries. The Secretary now seeks to recoup these sums, which would leave CHS with no recourse to obtain funding for the services it rendered.

panded the services it provided based on the intermediary's determination that the CETA funds should not reduce CHS' allowable costs under Medicare. Obviously, if the intermediary had concluded otherwise, CHS would not have undertaken the expansion. Consequently, its position, unlike Merrill's, will be adversely affected as a result of the misinformation it received if recoupment is allowed. *See Akbarin v. INS*, 669 F.2d 839, 943-44 (1st Cir. 1982) (requiring adverse change in position based on government misconduct as condition for estoppel). The fact that CHS may not have been entitled to the additional reimbursement cannot obscure the fact that it will suffer if it must repay those amounts.

Finally, the Secretary contends (Pet. Br. 34-35) that spending monies improperly obtained from the government is not a ground for resisting recoupment. Regardless of whether this is so in general, it is quite different to conclude, as part of an estoppel analysis, that repayment would not be a detriment to CHS.[14]

CONCLUSION

For the above reasons, these *amici* submit that when the government deals with private parties, there should be no categorical rule that the actions of its agents cannot result in estoppel. Where a provider relies in good faith on the specific rulings of the Secretary's agent, the innocent provider should not be penalized. As the Seventh

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[14] CHS is not seeking a benefit from the government; instead the Secretary is asserting a right to recoupment. It has long been held that even if equitable principles such as laches and estoppel may not apply in claims against the government, "when the government seeks its rights at the hands of a court, equity requires that the rights of others as well, should be protected." United States v. Stinson, 125 F. 907, 910 (7th Cir. 1903), *aff'd*, 197 U.S. 200 (1905); *see* Carr v. United States, 98 U.S. 433, 438 (1879). Since the Secretary seeks to use the courts to recover funds, *Stinson* and *Carr* hold that the Secretary cannot claim an exemption from normal rules of equity.

Circuit commented in *Portmann*, "a concern for administrative efficiency should not permit the government to deal unfairly or capriciously with its citizens." 674 F.2d at 1160. CHS conscientiously sought a ruling from the fiscal intermediary, the designated agent of the Secretary that was responsible for providing direction to CHS on Medicare reimbursement matters. CHS relied on the advice it received, and the fact that the Secretary subsequently repudiated the intermediary's conclusion should not harm the innocent provider. To hold otherwise would be harmful to the administrative scheme established under Medicare by preventing providers from relying on the organizations which were specifically established by statute to deal with providers on Medicare reimbursement policy. Precluding estoppel in appropriate cases could also result in a diminution of services for the citizens Congress intended to protect under the Medicare program. Moreover, a rule barring estoppel could prompt providers to seek ways to bypass the intermediary to obtain advice, thereby increasing the cost and burden of administering the Medicare program. The decision of the court of appeals should be affirmed.

Respectfully submitted,

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December 30, 1983

No. 83-56-CFX
Status: GRANTED

Docketed:
July 14, 1983

Title: Margaret M. Heckler, Secretary of Health and Human Services, Petitioner
v.
Community Health Services of Crawford County, Inc., et al.

Court: United States Court of Appeals for the Third Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Hasley, Raymond G.

Entry	Date	Note	Proceedings and Orders
1	May 4 1983		Application for extension of time to file petition and order granting same until July 14, 1983 (Brennan, May 6, 1983).
2	Jul 14 1983	G	Petition for writ of certiorari filed.
3	Aug 17 1983		DISTRIBUTED. September 26, 1983
4	Aug 17 1983	X	Brief of respondents Community Health Services of Crawford County, et al. in opposition filed.
5	Oct 3 1983		Petition GRANTED.
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6	Oct 25 1983	G	Motion of the Solicitor General to disperse with printing the joint appendix filed.
7	Nov 14 1983		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
9	Nov 15 1983		Order extending time to file brief of petitioner on the merits until November 28, 1983.
10	Nov 25 1983		Record filed.
11	Nov 25 1983		Certified original appd. & partial proceedings received.
12	Nov 30 1983		Brief of petitioner Heckler, Sec. of H&HS filed.
13	Dec 28 1983		Brief of respondents Community Health Services of Crawford, et al. filed.
14	Dec 28 1983		Brief amicus curiae of National Assn. for Home Care, et al. filed.
15	Jan 9 1984		SET FOR ARGUMENT. Monday, February 27, 1984. (1st case)
16	Jan 11 1984		CIRCULATED.
17	Feb 16 1984	X	Reply brief of petitioner filed.
18	Feb 27 1984		ARGUED.